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No.

In The

Supreme Court of the United States

October Term, 1980

OREST T. DUBNO, Commisioner of Revenue Services
of the State of Connecticut, et al,
Petitioner

vs.

MOBIL OIL CORPORATION, et al.,
Respondent

CARL R. AJELLO, Attorney General
of the State of Connecticut, et al,
Petitioner

vs.

TEXACO INC., et al
Respondent

ELLA T. GRASSO, Governor of the State of Connecticut, et al
Petitioner

vs.

AMERADA HESS CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly conclude that the rule of abstention as enunciated by this court in *Bellotti* v. *Baird* (428 U.S. 132), and as raised by the Petitioner's Motion to Dismiss in the District Court for the District of Connecticut, was a "threshold issue" and therefore reviewable only by the Temporary Emergency Court of Appeals, even though the state statute in question (Sec. 13(b) of Connecticut P.A. 80-71) is susceptible to a constitutional construction?

2. Did the Court of Appeals properly conclude that the Temporary Emergency Court of Appeals has exclusive jurisdiction over the issue of whether Sec. 13(b) of Connecticut P.A. 80-71 is preempted by the federal Emergency Petroleum Allocation Act?

3. Did the Court of Appeals properly conclude that this action was not barred by 28 U.S.C. Sec. 1341, (known as the Johnson Act) even though the statute in question effectively assessed the burden of the gross receipts tax, imposed by Connecticut P.A. 80-71, on the respondent oil companies?

LIST OF PARTIES

As Required By Supreme Court Rule 21-1(b)

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut

Petitioners

V.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON, U.S.A., INC., EXXON CORP., and SHELL OIL COMPANY

Respondents

CARL R. AJELLO, Attorney General of the State of Connecticut
OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut

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Respondent

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OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut

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TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Citations	v
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of Case	3
Reasons For Granting The Petition:	6
I. The Decision Of The Court Of Appeals For The Second Circuit Holding That The Temporary Emergency Court Of Appeals Has Exclusive Jurisdiction Over The Abstention And Preemption Questions Is In Conflict With Applicable Decisions Of This Court, Applicable Decisions Of The Temporary Emergency Court Of Appeals, And Is In Conflict With The Plain Meaning Of The Language Of 15 U.S.C. Sec. 754	6
II. If This Court Does Not Grant The Writ, The Petitioner State Of Connecticut Will Be Deprived Of Review Of Its Appeal On The Merits With Regard To Important Substantive Questions That Should Be Answered By This Court	16
III. The Court Of Appeals Decision Holding That The District Court Was Not Barred From Hearing This Case By The Johnson Act (28 U.S.C.	

Page

Sec. 1341) Renders The Prohibitions Of The Johnson Act Ineffectual 21

Conclusion 22

CITATIONS

Cases:	Page
Alabama State Federation of Labor v. *McAdory,* 325 U.S. 450, 655 S. Ct. 1384, 89 L.Ed. 1725 (1944) ...	9
Associated General Contractors v. *Laborers International Union Local 612,* 489 F.2d 749 (Em. App. 1973)	8
Atlantic Richfield Co. v. *Tribbit, Del. Ch.,* 399 A.2d 535 (1977)	11,15
Bellotti v. *Baird,* 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976)	9
Bray v. *U.S.,* 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed. 2d 215 (1975)	8,13
Butler v. *Dexter,* 426 U.S. 262, 96 S.Ct. 1527, 47 L. Ed. 2d 774 (1976)	19
Chicago and Northwestern Transportation Co. v. *Kalo Brick and Tile Co.,* 49 U.S.L.W. 4232 (U.S. March 9, 1981)	14
Citronelle-Mobile Gathering, Inc. v. *Gulf Oil Corp.,* 591 F.2d 711 (Em. App. 1979)	20
City of Groton v. *Federal Power Commission,* 487 F.2d 927 (Em. App. 1973)	8
Cloverleaf Butter Co. v. *Patterson,* 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754 (1942)	18
Coastal States Marketing Inc. v. *New England Petroleum Corp.,* 604 F.2d 179 (2d Cir. 1979)	11,14, 20,21

	Page
Exxon Corp. v. *Governor of Maryland,* 437 U.S. 117, 128-129, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978)	12,15,18
Florida Lime and Avocado Growers, Inc. v. *Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248, 256 (1963)	18
Goldstein v. *California,* 412 U.S. 546, 554-555 (1973), 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973).....	18
Governor of Maryland v. *Exxon Corp.,* 279 Md. 410, 370 A.2d 1102, 1120-1121 (1977) Affirmed 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978)	11,15
Harrison v. *NAACP,* 360 U.S. 167, 177, 79 S.Ct. 1025, 36 L.Ed. 2d 1152 (1959)	9
Huron Portland Cement Co. v. *Detroit,* 362 U.S. 440, 443, 446, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960).....	18
Joseph E. Seagram and Sons, Inc. v. *Hostetter,* 384 U.S. 35, 45, 16 L.ED.2d 336, 86 S.Ct. 1254 (1966) .	18
Longview Refining Co. v. *Shore,* 554 F.2d 1006 (Em. App. 1977)	8
Mitchell v. *Donovan,* 398 U.S. 427, 90 S.Ct. 1527, 26 L.Ed. 2d 378 (1976).....	19
Mountain Fuel Supply Co. v. *Johnson,* 556 F.2d 1375 (10th Cir. 1978)	14,20,21
MTM, Inc. v. *Baxley,* 420 U.S. 799, 95 S.Ct. 1278, 43 L.Ed.2d 636 (1975).....	19
Quincy Oil Inc. v. *Federal Energy Administration,* 620 F.2d 890, 893 (Em. App.)	10,11

	Page
Railroad Commission v. *Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971 (1940)	9,10
Saint Mary's Hospital v. *Ogilvie,* 496 F.2d 1324 (1974)	13
Spinetti v. *Atlantic Richfield Co.*, 522 F.2d 1401 (Em. App. 1975)	8
Texaco Inc. v. *Department of Energy,* 616 F.2d 1193 (Em. App. 1979)	10,13
United States v. *Cooper,* 462 F.2d 1393, 1398 (Em. App. 1973)	9
United States Statutes:	
Economic Stabilization Act of 1970, (Sec. 211), as subsequently codified in note to 12 U.S.C. §1904	6,7,20
Emergency Petroleum Allocation Act, P.L. 93-159, as subsequently codified in 15 U.S.C. §751 et seq.	Passim
28 U.S.C. §1253	19
28 U.S.C. §1291	8
28 U.S.C. §1341	21
10 C.F.R. §205.2	16
10 C.F.R. §212.2	21
Connecticut Statutes:	
Connecticut Public Act 80-71 §13(b)	Passim

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this matter on January 28, 1981.

OPINIONS BELOW

The January 28, 1981 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is not yet officially reported and is reprinted in the separate appendix to this petition (App. A pp. 1a-7a) The prior opinion of the U.S. District Court for the District of Connecticut, also reprinted in the appendix, (App. B, pp. 8a-28a) is reported at 492 E. Supp. 1004 (D. Conn. 1980).

The January 28, 1981 opinion in the companion case of *Mobil et al* v. *Tully et al* is also reprinted in the appendix (App. C, pp. 29a-42a). This decision also is not yet officially reported. The prior opinion of the District Court in that case is reported at 499 F. Supp. 888 (N.D.N.Y. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered January 28, 1981. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sec. 13(b) of Connecticut Public Act 80-71. The pertinent portions of this act are reproduced in the Appendix (App. D, pp. 43a-45a).

It also involves various sections of the Emergency Petroleum Allocation Act (P.L. 93-159) and amendments thereto. This act, as amended and as subsequently codified in 15 U.S.C. Sec. 751 et seq., is reproduced in the Appendix (App. E, pp. 46a-85a). Section 211 of the Economic Stabilization Act of 1970 (codified in note to 12 U.S.C. Sec. 1904) is also involved and it is also

reproduced in the Appendix (App. F, pp. 86a-90a). 28 U.S.C. Sec. 1341 is also involved and is reproduced in the Appendix. (App. G, p. 91a).

STATEMENT OF THE CASE

The 1980 Session of the Connecticut General Assembly enacted Public Act 80-71 which provides for a 2% gross receipts tax on petroleum companies engaged primarily in the refining and distribution of petroleum products and which distribute such products to wholesale and retail dealers for marketing and distribution in the State of Connecticut. P.A. 80-71, Sec. 1 (App. D).

Section 13 of this Act further provides:

> (a) It is not the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies.
>
> (b) No petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company raises its wholesale rack price for such product in all ports on the eastern coast of the United States.

The respondents are petroleum companies subject to the provisions of this Act. The respondents acknowledged the constitutionality of the tax imposed by Public Act 80-71, but by the

action brought to the District Court, challenged the constitutionality of Sec. 13(b) and sought declaratory and injunctive relief. The respondents alleged in their complaints that the District Court had jurisdiction of the action under 28 U.S.C. Sec. 1331 and 2201 in that the matter in controversy exceeded the sum of $10,000 and "arises under the Constitution of the United States and under the Emergency Petroleum Allocation Act (15 U.S.C. Sec. 751 et seq.).

The petitioners moved for dismissal of the action in the District Court based on the following three grounds:

1. That the District Court should have abstained from exercising jurisdiction in that Sec. 13(b) is susceptible to such a construction by the state courts that would moot the constitutional questions raised by the plaintiff.

2. That Sec. 13(b) is in effect a provision assessing the 2% Gross Receipts Tax imposed by P.A. 80-71 on the oil companies, and as such the District Court was prohibited from issuing an injunction against its enforcement by 28 U.S.C. Sec. 1341 (known as the Johnson Act).

3. That the District Court should have abstained in that the plaintiffs had adequate remedies in the state courts.

The District Court, without specifically ruling on the defendants' Motion to Dismiss, issued a declaratory judgment that Sec. 13(b) of Conn. P.A. 80-71 is unconstitutional in that it is pre-empted by federal law and thus violates the Supremacy Clause of the U.S. Constitution. The Court deferred action on the plaintiffs' request for injunctive relief. (App. B, pp. 27a-28a)

The petitioners appealed the judgment of the District Court to the Court of Appeals for the Second Circuit. In their pre-argument statement, the petitioners raised the above jurisdictional grounds and also contested the District Court's holding

that Sec. 13(b) was preempted by federal law. The respondents moved to dismiss the appeal alleging that under Sec. 5 of the Emergency Petroleum Allocation Act (15 U.S.C. Sec. 754(a) (1) (A)) and Sec. 211(b) (2) of the Economic Stabilization Act (codified in note to 12 U.S.C. Sec. 1904) (App. F, the Temporary Emergency Court of Appeals (hereinafter referred to as TECA) had exclusive jurisdiction over the preemption issue and that the abstention and 28 U.S.C. 1341 (Johnson Act) issues were "threshold issues" that had "no life apart" from the preemption issue and therefore were also exclusively within the jurisdiction of the TECA.

The Court of Appeals in its January 28, 1981 decision held that the TECA, and not it, had jurisdiction over the preemption and abstention issues and dismissed the appeal with regard to those issues. However, the Court of Appeals held that it did have jurisdiction over the anti-injunction act question and it affirmed the District Court on that question. (App. A, p. 6a)

The present petition is being brought to review the above decision.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT HOLDING THAT THE TEMPORARY EMERGENCY COURT OF APPEALS HAS EXCLUSIVE JURISDICTION OVER THE ABSTENTION AND PREEMPTION QUESTIONS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, APPLICABLE DECISIONS OF THE TEMPORARY EMERGENCY COURT OF APPEALS, AND IS IN CONFLICT WITH THE PLAIN MEANING OF THE LANGUAGE OF 15 U.S.C. SEC. 754.

A. 15 U.S.C. Sec. 754 Vests The Temporary Emergency Court Of Appeals With A Very Limited Grant Of Jurisdiction

Section 5(a) of the Emergency Petroleum Allocation Act (hereinafter referred to as EPAA), as codified in 15 U.S.C. Sec. 754, in pertinent part provides as follows:

> **§ 754. Administration and enforcement; delegation of authority; civil and criminal penalties**
>
> (a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

15 U.S.C. Sec. 754(a) (1) (A) incorporates by reference the Economic Stabilization Act (hereinafter referred to as E.S.A.), provisions which provide for the jurisdiction of the TECA. These provisions are reprinted in the notes following 12 U.S.C. Sec. 1904 (Banks and Banking) (West Supp. 1980). Sec. 211(b) (2) provides in pertinent part that TECA,

> shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title (ESA) or under regulations or orders issued thereunder.

It should be noted at the outset that 15 U.S.C. Sec. 754(a) (1) (A) by its language, makes the above TECA jurisdictional provisions applicable to only certain kinds of cases that arise under the EPAA. It plainly states that the judicial review provisions of the ESA apply only "to the regulation promulgated under Section 753(a) of this title, or to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter."

A "regulation promulgated under Section 753(a)" is a regulation of the Department of Energy establishing mandatory allocation and maximum prices for regulated petroleum products." Therefore, under 15 U.S.C. Sec. 754, TECA only has exclusive jurisdiction over cases arising under the EPAA's pricing regulations or under an "order" or "action taken by the President under this chapter." This grant of jurisdiction to TECA to hear cases arising under the EPAA is thus much more limited than TECA's jurisdiction to hear cases arising under the ESA. The Court of Appeals, in its holding that TECA had exclusive jurisdiction over the preemption and abstention issues in this case, completely ignored the impact of 15 U.S.C. Sec. 754 on the TECA's jurisdiction to hear EPAA questions, and erroneously equated the TECA's jurisdiction to hear questions arising under the EPAA with its jurisdiction to hear questions arising under the ESA. If the Court of Appeals had properly considered the impact of 15 U.S.C. Sec. 754 on the TECA's jurisdiction, it is

submitted that it would have come to the conclusion that it, and not TECA, has jurisdiction to hear the abstention and pre-emption issues posed in this case.

B. This Court And TECA Have Recognized The Limited Nature Of TECA's Jurisdiction

In *Bray* v. *United States,* 423 U.S. 73, 46 L.Ed.2d 215, 96 S.Ct. 307, this court noted that under 28 U.S.C. 1291, the courts of appeals, and not the TECA have the broad jurisdiction to review, "all final decisions of the district courts of the United States." This court stated at 423 U.S. 73-74 that the judicial review provision creating the TECA:

> was designed to provide speedy resolution of cases brought under the Act and "to funnel into one court all the appeals arising out of District Courts and thus gain in consistency of decision." S Rep No. 92-407, p. 10 (1971). *The provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals* over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291 [28 U.S.C.A. § 1291]. (emphasis added)

TECA has also recognized that it is a court of limited jurisdiction and that its jurisdiction must be strictly construed. It has repeatedly refused to exercise jurisdiction over issues or claims such as those in this case which, even though they may touch upon the EPAA, do not "arise under" the EPAA or involve the interpretation or the validity of any of its substantive provisions. For instance see *Longview Refining Co.* v. *Shore,* 554 F.2d 1006 (Em. App. 1977); *Spinetti* v. *Atlantic Richfield Co.,* 522 F.2d 1401 (Em. App. 1975); *Associated General Contractors* v. *Laborers International Union Local 612,* 489 F.2d 749 (Em. App. 1973); *City of Groton* v. *Federal Power Commission,* 487 F.2d 927 (Em. App. 1973). In *Spinetti,* the plaintiff asserted claims under the antitrust laws as well as under FEO regulations. Noting that "courts of special jurisdiction should strictly construe their statutory grants of jurisdiction," quoting

United States v. *Cooper,* 482 F.2d 1393, 1398 (Em. App. 1973), the TECA held that the antitrust, fair trade, and contractual claims were appealable only to the Court of Appeals. The Court took jurisdiction, however, to consider the claim asserted under the oil allocation regulations.

C. The Court of Appeals And Not TECA Has Jurisdiction Over The Abstention Issue Raised In This Case

The primary question which the District Court resolved in this case was the interpretation of Section 13(b) of Connecticut Public Act 80-71. The State of Connecticut in its appeal to the Court of Appeals claimed that the District Court erred in the construction which it applied to Section 13(b). The State has claimed that Section 13(b) is reasonably susceptible to a construction which would either "avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem." *Bellotti* v. *Baird,* 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed. 2d 844 (1976); *Harrison* v. *NAACP,* 360 U.S. 167, 177, 79 S.Ct. 1025, 3 L.Ed. 2d 1152 (1959); *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725.

This court has repeatedly held that where (as here) there has been no construction of a state statute by a state court and where the statute is susceptible of a constitutional construction, the federal courts must abstain from exercising jurisdiction. *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643, *Bellotti* v. *Baird,* supra.

In *Railroad Commission* v. *Pullman* at 312 U.S. 501, this court stated that:

> The doctrine of abstention is a self-imposed limitation upon the jurisdiction of the federal courts whereby the federal courts 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state government' and for the smooth working of the federal judiciary.

The District Court in this case, therefore, should have abstained and allowed the state court to interpret the state statute.

It is clear that the interpretation of a state statute does not arise under the federal pricing regulations of the EPAA. Under the principles of comity and federalism that underly the abstention doctrine, it is the state court and not the TECA that should construe state statutes. Further, the Court of Appeals and not the TECA has jurisdiction to review the propriety of the District Court's interpretation of Section 13(b) and the District Court's failure to apply the doctrine of abstention, since the TECA has held that its jurisdictional grant of authority is limited and does not extend to the interpretation of any law other than the Emergency Petroleum Allocation Act of 1973. *Texaco Inc.* v. *Department of Energy,* 616 F.2d 1193 (Em. App. 1979).

The Court of Appeals, however, with little discussion held that the question of abstention is a "threshold question which has no life apart from the substantive claim" of preemption. (See App. A, p. 6a). As stated by the Court of Appeals, the TECA has resolved issues such as standing, mootness, ripeness, and joinder of parties. Those issues, however, were decided only in conjunction with a substantive EPAA issue on appeal. The TECA has held that those issues had "no life apart from that substantive claim" and were decided only as part of the Court's normal and necessary appellate function. *Quincy Oil Inc.* v. *Federal Energy Administration,* 620 F.2d 890, 893 (Em. App. 1980). In light of the numerous decisions of this Court holding that the abstention doctrine is rooted in our federal system of government as a means to insure the rightful independence of the state governments and to preserve the harmonious relation between state and federal authority (*Railroad Commission* v. *Pullman Company,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1940)), it cannot be properly argued that abstention and the principles which underly that doctrine are not substantive issues and are, instead, only ancillary questions necessary to effectuate the general appellate powers of the TECA. Further, and importantly, the interpretation to be afforded to a statute of an individual state does not present a situation requiring

TECA review to gain "consistency of decision." *Quincy Oil Inc.* v. *Federal Energy Administration, supra.*

It should be noted that the interpretation of a state statute does not become an "EPAA issue" merely because of an EPAA preemption claim is raised in a complaint. In *Governor of Maryland* v. *Exxon Corp.*, 279 m.d 410, 370 A.2d 1102, 1120-1121 (1977), *affirmed* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978), and in *Atlantic Richfield Co.* v. *Tribbitt,* Del. Ch., 399 A.2d 535 (1977), the individual states passed new statutes regulating the retail price of gasoline. The oil companies involved (including the present respondent Gulf Oil Corporation) instituted declaratory judgment actions in the *state courts* contesting the constitutionality of those enactments. Included in their *complaints* were allegations of conflicts with the federal EPAA, with the Commerce Clause and with other provisions of the United States Constitution. Apparently, neither the companies nor the courts viewed the construction and interpretation of those state statutes as presenting "EPAA issues" requiring exclusive review by a Federal District Court under Section 211(a) of the Economic Stabilization Act of 1970, 12 U.S.C. §1904 note, or requiring appellate review by the TECA under Section 211(b) (2). As Sections 211(a) and 211(b) (2) of the ESA confer the same exclusive jurisdiction on a District Court and on the TECA to hear all claims "arising under" the EPAA,[1] the fact that the state courts in *Governor of Maryland* v. *Exxon Corp., supra* and *Atlantic Richfield Co.* v. *Tribbitt, supra,* construed their own state statutes, despite a claimed conflict with the EPAA and the Commerce Clause demonstrates that a construction of a state statute does not constitute an "EPAA issue" requiring decision by a Federal District Court and the TECA. In

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[1]The companies' EPAA preemption claims in *Governor of Maryland* v. *Exxon Corp.*, supra and in *Atlantic Richfield Co.* v. *Tribbett,* supra, were raised in their complaints and did not enter the state court proceedings "by way of defense" which would have constituted an exception to the District Court's 211(a) "arising under" jurisdiction. *Coastal States Marketing* v. *New England Petroleum,* 604 F.2d at p. 183.

fact, those cases demonstrate that a state court is fully capable of interpreting its own state statutes and those cases fully support Connecticut's instant argument in favor of abstention. It also should be noted that in the oil companies' unsuccessful appeal to this Court, none of the parties questioned the jurisdiction of the State Court to hear that case, even though a claim of preemption by the EPAA was raised. (See Exxon, *supra* 437 U.S. 122, N.5).

It is clear, therefore, that the question of the proper construction of Section 13(b) of Connecticut P.A. 80-71 and the District Court's failure to apply the doctrine of abstention do not present "EPAA issues" on appeal. Consequently, the proper appellate avenue was to the Court of Appeals not the Temporary Emergency Court of Appeals.

D. The Court of Appeals Not The TECA Has Jurisdiction Over The Preemption Issue Raised In This Case

1. If this case arises under the EPAA it arises under Sec. 6B of the EPAA, which is not mentioned in 15 U.S.C. Sec. 754

If this case arises under the EPAA, as the Court of Appeals held, then the only possible provision of the EPAA that it could have arisen under is Sec. 6(b) of the EPAA, which is codified as 15 U.S.C. Sec. 755(b). This is the EPAA's explicit preemption provision and it provides as follows:

> **Preemption of State or local allocation regulations and orders**
>
> (b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

However, 15 U.S.C. Sec. 754, as has previously been noted, only gives the TECA jurisdiction over cases arising under regulations issued under Sec. 753a, which authorizes the EPAA's pricing and allocation regulations, or to "orders" or "actions" by the President under the EPAA. Congress did not include Sec. 6(b), 15 U.S.C. Sec. 755b, in Sec. 754. If Congress intended to incorporate the TECA jurisdictional provisions to claims of preemption under Sec. 6(b) of the EPAA, it easily could have included Sec. 6(b) in Sec. 754. The fact that it did not do so can only reasonably be interpreted as meaning that Congress did not intend that the TECA have jurisdiction over claims of preemption arising under the EPAA such as the claim of preemption in the instant case.

2. A review of the preemption standard applied by the District Court falls within the Court of Appeals' expertise and not the TECA's

The fact that the EPAA is discussed in a decision or that the EPAA is "related" to the issue is not determinative of whether an issue is an "EPAA issue." *Saint Mary's Hospital* v. *Ogilvie,* 496 F.2d 1324 (1974), *Texaco Inc.* v. *Dept. of Energy, supra.* Instead, an EPAA issue arises only when a determination is to be made which will directly question either the EPAA, or an order or regulation issued thereunder or an action of the President, requiring the TECA's particular expertise to provide national uniformity and consistency of decision. For instance, in *Bray* v. *U.S., supra,* in which the defendant petitioner was convicted of criminal contempt for refusing to obey a subpoena issued as part of an investigation under ESA, this Court, holding that the Court of Appeals, rather than TECA had jurisdiction, vacated the Court of Appeals judgment and remanded the case stating at 423 U.S. 75 that:

> Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is *not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme.* Indeed, a requirement of such review would

> only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals. (emphasis added)

Similarly, the reasons for exclusive TECA jurisdiction — consistency of opinion and maximization of TECA's expertise — are not present with regard to the preemption claim being made in the instant case. As this court recently noted in *Chicago and Northwestern Transportation Company* v. *Kalo Brick & Tile Company,* No. 79-1336, 49 U.S.L.W. 4232 (U.S. March 9, 1981), the determination of whether there is preemption is "essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict."

In this case, the District Court construed Section 13(b) of Connecticut Public Act 80-71 and compared it with the federal policy contained in the EPAA. No portion of the EPAA or any order or regulation issued under that Act or any action of the President was called into question before the District Court or before the Court of Appeals. Further, Section 13(b) specifically provides that it does not apply to any product regulated within the purview of the EPAA and the companies have admitted that any products which fall within the Connecticut taxing statute are, in fact, exempt from the EPAA. Unlike the cases interpreting substantive provisions of the EPAA, the instant case does not present questions which require the TECA's expertise.

Coastal States Marketing Inc. v. *New England Petroleum Corporation,* 604 F.2d 179, (2d Cir. 1979), and *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375 (10th Cir. 1978), which are referred to in the Court of Appeals' opinion in the *Tully* case, (See, App. C) both involved interpretation of substantive provisions of the EPAA and therefore required the TECA's expertise. Neither of these cases or any other cases cited by the respondents in the Court of Appeals involved claims of preemption under Sec. 6(b) of the EPAA. By its nature, a preemption decision can have no impact on federal policy or federal law because of the operation of the Supremacy Clause

of the United States Constitution. Whether or not a particular state statute runs afoul of federal law does not present a question of national uniformity, *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 128-129, 98 S.Ct. 2207, 57 L.Ed. 2d 91 (1978), and does not require the TECA's particular expertise to provide consistency and uniformity of decision as would be the case where a portion of the EPAA was directly adjudicated. In its appeal, the State of Connecticut has questioned the preemption standard which the District Court applied to Section 13(b). A review of the proper preemption standard does not involve the application or interpretation of the EPAA or any rule or order issued thereunder. Instead, such review would only involve the application of established preemption law, an analysis that the Court of Appeals would normally undertake in any case where a claim of preemption is made.

The fact that the State's appeal of the District Court's preemption decision does not constitute an "EPAA issue" is confirmed by the decisions in *Governor of Maryland* v. *Exxon Corp., supra* and *Atlantic Richfield Co.* v. *Tribbett, supra* where EPAA preemption claims were raised in and decided by state courts. If such preemption claims were "EPAA issues" as the Court of Appeals held, Section 211(a) of the Economic Stabilization Act of 1970 would have required such issues to be initially adjudicated in a federal District Court and then appealed to the TECA. As the companies' EPAA preemption claims were not adjudicated in the District Courts in *Governor of Maryland* v. *Exxon, supra* or in *Atlantic Richfield Co.* v. *Tribbett, supra,* the instant EPAA preemption claims do not have to be reviewed by the TECA. Further, it is not apparent that either the District Court of the companies considered that the instant case involved an "EPAA issue." The companies questioned Section 13(b) on both Supremacy Clause and Commerce Clause grounds. Such issues present substantial constitutional questions. The fact that the issues were not immediately certified to the TECA pursuant to Section 211(c) of the ESA indicates that neither the Court nor the respondents viewed this case as presenting an EPAA issue at the District Court level.

II

IF THIS COURT DOES NOT GRANT THE WRIT THE PETITIONER STATE OF CONNECTICUT WILL BE DEPRIVED OF REVIEW OF ITS APPEAL ON THE MERITS WITH REGARD TO IMPORTANT SUBSTANTIVE QUESTIONS THAT SHOULD BE ANSWERED BY THIS COURT

A. The District Court's Decision Raises Important Substantive Questions That Should Be Answered By This Court

The District Court of Connecticut in its opinion did not hold that Sec. 13b of Connecticut P. A. 80-71 conflicts with any pricing regulation issued under the EPAA. Indeed, it would have been impossible for the District Court to find such a conflict. A reading of Sec. 13(b) makes it obvious that the Connecticut legislature carefully drafted this provision so as to avoid any possible conflict with federal law. By its terms, Sec. 13(b) only applies to petroleum products "exempt from the Federal Emergency Petroleum Allocation Act (P.L. 93-159." (See App. D) Therefore, it is impossible for there to be a conflict between this section and the federal law, since this section is, by its terms, automatically inapplicable if the federal law is applicable. Sec. 13(b), even if viewed as a price regulation, could not possibly directly conflict with any federal regulation on pricing, since so called "exempted" products fall under *no federal regulation* as to price. The grant of an exemption "means the release from the obligation to comply with any part or parts, or subparts thereof this chapter." 10 C.F.R. Sec. 205.2. Simply stated, there are *no federal regulations or orders pertaining to the price of so called "exempted" products.* Therefore, a *direct conflict* between such a regulation or order and Sec. 13(b) *is impossible.* The District Court, therefore, did not find any direct conflict with any federal regulation or order, nor did it find that the federal government "occupied the field" of petroleum pricing. Rather, the court found that Sec. 13(b) frustrated an articulated federal intention that an area which the federal government temporarily regulated and from which it has now withdrawn be

kept altogether vacant: in other words, it said that when the federal government left the field it took the states with it.

In effect, the District Court ruled that because the federal government regulated the price of petroleum products for a short period in response to an emergency and then withdrew from regulation of a large segment of the market, that the states were forever barred from regulating the area even a hundred years from now — *even though Congress never said so.* This conclusion is obviously absurd. When Congress spoke of "a gradual *return* to an unregulated market," S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 203 (1975) (emphasis added), it meant a return to the status quo before the enactment of the EPAA and to restore pre-existing state powers.

We do not doubt that the federal government could, if it wished, establish a free market as the law of the land, nullifying state laws and effectively granting sellers of petroleum products a right to charge whatever price they desire. But neither the respondents nor the District Court explained how it can plausibly be thought that in 1973 Congress singled out the petroleum industry as one requiring extraordinary federal interference, and just two years later singled it out as the one industry among all others in which the free market was functioning so perfectly as to displace all state authority. So far as appears, in moving toward deregulation, neither Congress nor the administrators ever considered that their actions would eradicate ordinary pre-existing state powers. Certainly the federal authorities never gave any indication that by phasing out Congressional regulation of prices they intended to override state laws determining the incidence of states taxes such as Sec. 13b of Conn. Public Act 80-71.

Imputation of such an intention to Congress flies in the face of reality. If Congress had expressed any such intention, it would have been a matter of great public debate and conflict. Consumer lobbies would have been mobilized, members of Congress, many of whom even today regard the removal of federal price controls on petroleum as unwise, would have thun-

dered against such a permanent grant of freedom to the oil companies.

That none of this happened is the clearest demonstration that Congress had no such intent. To attribute such an intention to Congress now — five years later — would be to make a mockery of the legislative and political processes.

Another logical flaw in the District Court's theory is that when the Congress in 1975 provided for expiration of the regulatory authority, did it intend to oust state power in the interim? If Congress did intend to oust state power was the ouster to be temporary, with state power to regenerate spontaneously on October 1, 1981, upon expiration of the EPAA; or did it intend that the ouster of state power be permanent?

Not only is the District Court's decision logically flawed, it is also in clear conflict with numerous decisions of this Court. This Court has repeatedly said that "it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, 156, 62 S.Ct. 491, 86 L.Ed. 754 (1942). *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 10 L.Ed.2d 248, 256, 83 S.Ct. 1210 (1963), *reh den* 374 U.S. 858, 10 L.Ed. 2d 1082, 83 S.Ct. 1861. This Court has also said that there must be an "actual conflict" between the state and federal regulations as opposed to a "hypothetical one," *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1960), *Goldstein* v. *California,* 412 U.S. 546, 554-555 (1973) and that "the teaching of this Court's decision...enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 130, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), quoting from *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 446, 4 L.Ed.2d 852, 80 S.Ct. 813 (1960), and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966).

It is submitted that the District Court has sought out such a conflict "where none clearly exists" in the instant case.

B. The State of Connecticut Should Be Allowed A Hearing On The Merits Of Its Appeal

As noted above, the Petitioner State of Connecticut's appeal from the District Court's decision raised important substantive questions. The Court of Appeals holding that it lacks jurisdiction to hear the preemption and abstention questions effectively leaves the petitioner State of Connecticut with no opportunity for review of these questions, since the state did not appeal to the TECA. Even if this Court should conclude that the Court of Appeals is correct in its holding as to the allocation of jurisdiction between it and the TECA, it is, nevertheless, respectfully submitted that this Court should grant certification, vacate the judgment of the District Court, and remand this case back to the District Court and direct it to issue a new judgment from which the petitioner State of Connecticut can file a timely appeal to the TECA. This Court has granted this type of relief in numerous cases where, as in this case, the law was unclear or uncertain as to where the appeal should be taken. For instance, *see Mitchell* v. *Donovan,* 398 U.S. 427, 26 L.Ed.2d 378, 90 S.Ct. 1763 (1970), *Butler* v *Dexter,* 426 U.S. 262, 47 L.Ed.2d 774, 96 S.Ct. 1527 (1976), and *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 43 L.Ed.2d 636, 95 S.Ct. 1278 (1975).

In *Donovan* which was a direct appeal from the decision of a three judge panel, this Court held that it lacked jurisdiction under 28 U.S.C. §1253, which provides for direct appeal to this Court from a three-judge Federal District Court order granting or denying "an interlocutory or permanent injunction," because the order appealed from did no more than deny the plaintiffs a declaratory judgment striking down the Communist Control Act. However, this court noted at 398 U.S. 431 that:

> A simple dismissal for want of jurisdiction, however, would leave the appellants with no recourse to appellate review, because they brought their appeal here rather than to the Court of Appeals and the time for appealing to the Court of Appeals has long since passed.

This Court therefore remanded the case to the District Court so that a "fresh" judgment, from which the plaintiff could take a timely appeal to the Court of Appeals, could be issued.

In the instant case, as in *Donovan,* and the other cases cited above, the petitioner would be left with no recourse for appellate review if this Court does not grant relief. It should also be noted that the law as to where the appeal should be taken to in the instant case was much more uncertain than in *Donovan* or the other cases cited above. As noted above, a reading of the plain language contained in 15 U.S.C. Sec. 754, which incorporates the TECA jurisdictional provisions with regard to certain cases arising under the EPAA, would not lead one to the conclusion that the TECA has jurisdiction over a case such as this one which challenges a state statute on preemption grounds.

Although dicta in some cases discussing the scope of TECA's exclusive appellate jurisdiction may be read to suggest that Section 754 of the EPAA rendered the ESA judicial review procedures fully applicable to *all* cases involving any EPAA issue, *see e.g., Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179, 182 (2d Cir. 1979); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.,* 591 F.2d 711 (Temp. Emer. 1979); *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375, 1379 (10th Cir. 1978), none of these cases involved challenges to the constitutionality of a state statute on the ground that the statute conflicted with the EPAA. None addressed the exclusivity of federal court jurisdiction — at either the trial or appellate level — of a preemption claim implicating Section 6(b) of the EPAA. Indeed, none of them focused on the limited scope of §754 of the EPAA. Instead, all of them were limited to holding what 15 U.S.C. §754 plainly states: that TECA has exclusive appellate jurisdiction — and presumably that the federal district court has exclusive original jurisdiction — of all suits involving the interpretation and enforcement of the mandatory allocation and price "regulation[s] promulgated under 753(a)." See *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra,* (purchaser of petroleum contends that it failed to pay seller for petroleum received because the contract price exceeded the

mandatory price controls set forth in 10 C.F.R. §212.2); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra* (same); *Mountain Fuel Supply Co.* v. *Johnson, supra,* (buyer in breach of contract action counterclaims that the seller disregarded ceiling prices set forth in the EPAA regulations and alternatively that the allocation and pricing provisions are unenforceable because they destroy his "competitive viability").

It follows from the above that the instant case was a case of first impression and was unique. *Never before* did any court hold that the *TECA has exclusive jurisdiction over a challenge to a state statute on preemption grounds.* Therefore, assuming that the Court of Appeals' decision is correct, it is the first decision to so hold, and prior to that decision, the law was highly uncertain as to where an appeal, such as that in the instant case, should be brought.

For the above reasons, we respectfully submit that even if this court should hold that the appeals court is correct on the preemption and abstention issues, that this Court should grant such relief in accordance with the *Donovan* decision as to allow the petitioner a hearing on the merits of its appeal.

III

THE COURT OF APPEALS DECISION HOLDING THAT THE DISTRICT COURT WAS NOT BARRED FROM HEARING THIS CASE BY THE JOHNSON ACT (28 U.S.C. SEC. 1341) RENDERS THE PROHIBITIONS OF THE JOHNSON ACT INEFFECTUAL.

In its appeal to the Court of Appeals, the State of Connecticut has contended that Section 13(b) of Public Act 80-71 is an integral part of a state taxing statute insuring the proper assessment of the economic burden created by the Connecticut gross receipts tax. Although Section 13(b) represents an untraditional application of an assessment provision of a state taxing statute, Section 13(b), nevertheless, falls within the scope of the Johnson Act, 28 U.S.C. 1341, barring federal District Court review.

CONCLUSION

For the reasons outlined above, it is respectfully submitted that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted

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Office-Supreme Court, U.S.
FILED
APR 28 1981
ALEXANDER L. STEVAS,
CLERK

80-1813

No.

In The

Supreme Court of the United States

October Term, 1980

OREST T. DUBNO, Commisioner of Revenue Services
of the State of Connecticut, et al,
Petitioner

vs.

MOBIL OIL CORPORATION, et al.,
Respondent

CARL R. AJELLO, Attorney General
of the State of Connecticut, et al,
Petitioner

vs.

TEXACO INC., et al
Respondent

ELLA T. GRASSO, Governor of the State of Connecticut, et al
Petitioner

vs.

AMERADA HESS CORPORATION
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VOLUME I

TABLE OF CONTENTS

	Page
APPENDIX A Opinion Of Court Of Appeals	1a
APPENDIX B Opinion Of District Court	8a
APPENDIX C Opinion Of Court Of Appeals In Companion Case (*Mobil, et al* v. *Tully*)	29a
APPENDIX D Connecticut Public Act No. 80-71	43a
APPENDIX E Emergency Petroleum Allocation Act With Amendments As Codified	46a
Correspondence Between Respondents Mobil And U.S. Department Of Energy, Wherein, D.O.E. Express Its Opinion That Section 13(b) Of Conn. P.A. 80-71 Is Not Preempted By E.P.A.A.....	82a
APPENDIX F Section 211 Of The Economic Stabilization Act Of 1970 As Codified In Note To 12 U.S.C.A. §1904 ..	86a
APPENDIX G Tax Injunction Act, 28 U.S.C. §1341	91a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 539 — September Term, 1980
Argued October 30, 1980 — Decided January 28, 1981
Docket No. 80-7677

MOBIL OIL CORP., AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, and SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION and SHELL OIL COMPANY,

Plaintiffs-Appellees,

— against —

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut,

Defendants-Appellants.

TEXACO INC., a Delaware Corporation,

Plaintiff-Appellee,

— against —

CARL R. AJELLO, Attorney General of the State of Connecticut
OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut,

Defendants-Appellants.

AMERADA HESS CORPORATION,

Plaintiff-Appellee,

— against —

ELLA T. GRASSO, Governor of the State of Connecticut
OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut,

Defendants-Appellants.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges, and WERKER, District Judge.*

Appeal from an order of the United States District Court for the District of Connecticut, Judge M. Joseph Blumenfeld, declaring the anti-passthrough provision of Connecticut's tax upon the gross earnings of integrated oil companies derived from the sale of petroleum products in the state to be preempted by the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. and the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83.

Affirmed as to the inapplicability of the Tax Injunction Act, 28 U.S.C. § 1341, dismissed as to the preemption and abstention issues.

WILLIAM E. GLYNN, Hartford, Conn. (Day, Berry & Howard, Hartford, Conn., Richard M. Reynolds, Allan B. Taylor, J. Bruce Boisture, of counsel) for Plaintiffs-Appellees.

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*United States District Judge for the Southern District of New York, sitting by designation.

FRANCIS J. McNAMARA, JR., Stamford, Conn. (Cummings & Lockwood, Stamford, Conn., Eric Watt Wiechmann, Joseph D. Magri, of counsel) for Plaintiff-Appellee Texaco, Inc.

CAPLIN & DRYSDALE, Washington, D.C. (Robert H. Elliott, Myron C. Baum, Albert G. Lauber, Jr., Washington, D.C., and SACHS, SACHS, DELANEY & SACHS, Milford, Conn., Arthur S. Sachs, Milford, Conn., of counsel) for Plaintiff-Appelleee Amerada Hess Corporation.

PETER W. GILLIES, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General, Richard K. Greenberg, Paul M. Scimonelli, Ralph G. Murphy, Robert L. Klein, William B. Gundling, Assistant Attorneys General, Hartford, Conn., of counsel) for Defendants-Appellants.

MULLIGAN, Circuit Judge

On April 11, 1980, Conn. Publ. Act. No. 80-71 (Conn. Act) was signed into law and it became effective July 1, 1980. Section 1 of the Act imposes a 2% tax on the gross earnings derived by integrated petroleum companies from the sales of petroleum products in the State of Connecticut. As in the companion New York case decided today, *Mobil Oil Corp.* v. *Tully,* No. 80-7785, slip op. _____ (2d Cir.), the Connecticut legislature intended that the burden of the tax would be borne by the oil companies and not the Connecticut purchasers of oil products. Conn. Act § 13(a). Thus, in Section 13(b) of the Act (the anti-passthrough provision), the legislature provided that:

> [n]o petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company

> raises its wholesale rack price for such product in all ports on the eastern coast of the United States.

The Connecticut anti-passthrough provision differs from the New York provision in several respects. The Connecticut provision applies only to the prices of those petroleum products "exempt" from the EPAA whereas the New York provision was not so limited. In addition, oil companies can raise the price of "exempt" petroleum products in Connecticut as long as the companies similarly raise the prices in the other east coast states in which they sell their products. The New York provision, on the other hand, constituted an absolute ban on price rises based upon the gross receipts tax in New York. Finally, the Connecticut legislature did not rest the validity of the entire tax act upon the viability of Section 13(b). Rather, in Section 15 of the Act, the legislature specifically provided that:

> [i]f any section, part, clause or phrase in sections 1 through 16, inclusive, of this act, is for any reason held to be invalid or unconstitutional, sections, parts, clauses and phrases in said sections not held to be invalid or unconstitutional shall not be affected and shall remain in full force and effect.

None of these differences, however, is significant to the resolution of this case.

The plaintiffs, eleven oil companies subject to the tax and anti-passthrough provision, brought this action seeking declaratory and injunctive relief in the District Court for the District of Connecticut. The oil companies argued that the anti-passthrough provision violated both the Due Process and Interstate Commerce clauses of the United States Constitution. In addition, the companies argued that the provision was in conflict with the EPAA and the Federal Mandatory Petroleum Price Regulations and was, therefore, preempted by the Supremacy Clause of the United States Constitution. The defendants-appellants, the Governor of Connecticut, Connecticut Attorney General, Connecticut Commissioner of Revenue Services and

Connecticut Secretary of the Office of Policy and Management, moved to dismiss the action for want of federal jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 as well as the doctrine of abstention, and the plaintiffs-appellees moved for summary judgment.

Judge M. Joseph Blumenfeld, in a July 9, 1980 memorandum of decision impliedly denied the defendants' motion to dismiss and granted the plaintiffs-appellees' motion for summary judgment. As in the New York case, Judge Blumenfeld limited his decision to declaring that the anti-passthrough provision was a price control measure and was therefore preempted by the EPAA and the regulations issued thereunder. The opinion is reported at 492 F. Supp. 1004 (D. Conn. 1980).

The appellant state officers appeal from the adverse rulings of Judge Blumenfeld on their motion to dismiss and on the plaintiffs appellees' motion for summary judgment. The oil companies have moved before this court to dismiss this appeal in its entirety arguing that exclusive jurisdiction over this appeal is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of 15 U.S.C. § 754(a) (1).

I.

This court in *Mobil Oil Corp.* v. *Tully, supra,* has today decided the very same questions presented in this companion case. Thus, no further discussion of this court's jurisdiction is required. Judge Blumenfeld held that Section 13(a) of the Connecticut Act was in effect a price control measure which conflicted with the EPAA and its regulations and was, therefore, preempted by the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2). Because this decision necessarily involved a thorough analysis of the EPAA and the Mandatory Price Regulations, see *Mobil Oil Corp.* v. *Tully, supra,* slip op. at _____, the district judge adjudicated an ESA (EPAA) issue and, therefore, exclusive jurisdiction over this part of the case lies with TECA pursuant to 15 U.S.C. § 754(a) (1). *Id.*

As in *Mobil Oil Corp.* v. *Tully, supra,* however, we hold that this court, and not TECA, has jurisdiction to review the district court's ruling on the defendants-appellants' motion to dismiss pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. Because this question involves a statute plainly not within the EPAA and it is severable and independently appealable, we must deny the appellee's motion to dismiss with respect to the Tax Injunction Act. See *Texaco, Inc.* v. *Department of Energy,* 616 F.2d 1193 (TECA 1979). Review of the lower court's decision not to abstain, however, is properly within the jurisdiction of TECA. TECA has consistently exercised jurisdiction over ancillary threshold issues such as mootness, ripeness, and venue. *See e.g., Quincy Oil, Inc.* v. *Federal Energy Administration,* 620 F.2d 890, 893 (TECA 1980). Although the Tax Injunction Act issue is separate and independent from the EPAA issues, abstention is properly classified as a threshold issue which has no life apart from the substantive claim. *Id.* A decision to abstain in this case would necessarily involve a finding that some possible interpretation of Section 13(b) would render the provision consistent with the federal regulatory framework. Such a finding, however, would necessarily entail some analysis of the federal and state statutes and regulations. Thus, we will defer to TECA's particular expertise in this area.

We therefore hold that the appellees' motion to dismiss is granted with respect to the preemption and abstention issues but denied with respect to the applicability of the Tax Injunction Act.

II.

Having found that this court has jurisdiction over the applicability of the Tax Injunction Act, 28 U.S.C. § 1341, we now hold, as we have held today in *Mobil Oil Corp.* v. *Tully, supra,* that Section 1341 does not bar this action. Section 13(b), the anti-passthrough provision, is not an exercise of the state's taxing power. Rather, in prohibiting the oil companies from raising their posted wholesale rack price in Connecticut by an amount higher than the average price rise by the oil companies

in all other ports on the eastern coast of the United States, Connecticut has created a price control system even more complex than the New York provision in *Mobil Oil Corp.* v. *Tully, supra.* Moreover, as in New York, it was the express purpose of the legislature in enacting Section 13(b) that the tax "[not] be construed as a tax upon the purchasers of petroleum products" and, thus, "such tax shall constitute a part of the operating overhead of such companies." Conn. Act. § 13(a). Finally, it cannot seriously be argued that the judgment of the court below has enjoined, suspended or restrained the assessment, levy or collection of the gross receipts tax. By virtue of Section 15 of the Connecticut Act, the legislature specifically provided that if Section 13(b) or any other section, part or phrase were held to be invalid or unconstitutional the remaining sections of the act would remain in full force and effect. Thus, the Connecticut tax is continuing to accrue and be collected. We therefore hold that the district court was not barred from declaring Section 13(b) to be preempted by the EPAA because these actions did not seek to restrain the assessment, levy or collection of a tax. We do not reach, therefore, the second question under Section 1341 — whether there existed a plain speedy and efficient state remedy in the state courts.

Appeal dismissed with respect to the preemption and abstention issues, affirmed with respect to the inapplicability of the Tax Injunction Act. Any further relief should be sought from TECA.

MOBIL OIL CORP. v.
Tully — 80-7785

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MOBIL OIL CORP., ET AL.	:	
v.	:	CIVIL NO. H-80-359
OREST T. DUBNO, ET AL.	:	
TEXACO, INC.	:	
v.	:	CIVIL NO. H-80-376
CARL R. AJELLO, ET AL.	:	
AMERADA HESS CORP.	:	
v.	:	CIVIL NO. H-80-377
ELLA T. GRASSO, ET AL.	:	

MEMORANDUM OF DECISION

The plaintiffs, in their respective complaints in these three actions, seek declaratory and injunctive relief against the implementation or enforcement of section 13(b) of Public Act 80-71 of the State of Connecticut.[1] A hearing on the plaintiffs' motion for a preliminary injunction was conducted on June 23, 1980. A hearing on the merits was held on June 30, 1980. The cases are thus ripe for final decision.

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[1]The sections of P.A. 80-71 that are relevant to this action are reproduced in an Appendix to this opinion.

I. BACKGROUND

A. The Connecticut Statute

Section 1 of Public Act 80-71 of the 1980 Connecticut General Assembly ("the Act") singles out a narrow group of companies and imposes a two-percent tax on the gross receipts of those companies from their sales in Connecticut. Only a company that is engaged primarily in the *refining and distribution* of *petroleum* products and that distributes such products to wholesale and retail dealers for marketing and distribution in Connecticut must pay the tax. Since there are no petroleum refineries in Connecticut, the restrictions on the application of the tax contained in section 1 effectively limit the tax to integrated petroleum companies engaged in both the refining and distribution of petroleum products in a number of states. In contrast, companies that only distribute petroleum products are not taxed on their receipts from sales in Connecticut.

In the ordinary course of business, the cost of a tax such as the gross receipts tax would be passed along to purchasers in the form of higher prices. In order to avoid the predictable application of the tax burden to Connecticut purchasers, the General Assembly enacted section 13 of the Act.

Section 13(a) contains a general statement of legislative intent: "It is...the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon... and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies." Section 13(a) itself contains no provision respecting the price of petroleum products.

Implementing the intent to have the gross receipts tax treated as an overhead cost, section 13(b) forbids each company subject to the tax to raise its wholesale prices in Connecticut by any amount higher than the average amount by which it raises such prices "in all ports on the eastern coast of the United States." Because of section 13(b), such costs may not be added entirely

to prices in Connecticut, but may be recouped only on a pro rata basis from all customers in the states (including Connecticut) to which petroleum products are distributed from east coast ports.

The pricing provisions of section 13(b) apply only to petroleum products "exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) ["EPAA"]." At the present time, these so-called exempt products include home heating oil, diesel fuel, residual fuel oil, automotive motor oil, industrial oil and greases, and aviation fuel.

The plaintiffs in these three actions are petroleum companies subject to the tax imposed by section 1 of the Act and therefore to the pricing provisions of section 13(b). They will be required by sections 1 and 7 of the Act to file quarterly returns and payments of the tax, which the state anticipates will total approximately $60 million in the next year. This court is not asked to decide whether the imposition of the tax is valid. The companies concede that it is and have indicated their intention to pay that tax when due. They challenge only section 13(b), which restricts their ability to pass through the entire cost of the tax to Connecticut purchasers. Pursuant to section 30 of the Act, section 13(b) became effective on July 1, 1980.

The plaintiffs contend that Connecticut's action is barred by reason of provisions in the federal Constitution and laws. Their primary argument is that section 13(b) is pre-empted by federal regulation and thus cannot stand under the Supremacy Clause of the Constitution.[2] U.S. Const., art. VI, cl. 2. Analysis of this contention requires examination of the federal statutory and regulatory scheme on which the plaintiffs rely, a task to which we now briefly turn.

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[2]Additionally, the plaintiffs argue that section 13(b) unduly burdens interstate commerce in violation of the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and that it violates the Due Process Clause of the fourteenth amendment.

B. The Federal System for the Pricing of Petroleum Products

When Congress enacted the EPAA, it found that shortages of various petroleum products "constitute[d] a national energy crisis" requiring action by the federal government. 15 U.S.C. § 751(a) (3). To alleviate this crisis in the "national distribution system" for such products, *id.* § 751(b), the Congress authorized the President to promulgate regulations governing the allocation and pricing of crude oil, residual fuel oil, gasoline, kerosene, distillates, LPG, refined lubricating oils, and diesel fuel throughout the United States. *Id.* § 753(a).[3] The Congress specifically instructed the President to keep in view the national scope of the subject to be regulated, requiring that his regulations should provide, to the maximum extent practicable, for the "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at *equitable prices among all regions and areas of the United States....*" *Id.* § 753(b) (1) (F) (emphasis added.)[4]

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[3]Title 15 U.S.C. § 753(a) provides:

> "Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States."

[4]In addition, the President was required to provide, to the maximum extent practicable, for the "minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." 15 U.S.C. § 753(b) (1) (I).

The understanding of Congress that the allocation and pricing of petroleum products is a national problem requiring federal regulation is reflected also in the legislative history of the EPAA. When Senator Henry Jackson, sponsor of Senate Bill 1570, first introduced the bill on April 13, 1973 he underscored the importance of Congress' actions "to build a coordinated and rational fuels and energy policy." 119 Cong. Rec. 12317, *quoted in* S. Rep. No. 93-159, 93d Cong., 1st Sess. 21 (1973). Later, Senator Jackson as floor manager of the bill during the Senate debates urged that one of the reasons that Congress should enact mandatory rather than voluntary measures to address the fuel supply problem was to avoid piecemeal action by the states:

> "Further, if the Federal Government fails to establish effective regional or national allocation plans, we will invite piecemeal action by the States. Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level."

119 Cong. Rec. 17764 (1973).

In response to the EPAA the President, acting through a series of executive agencies now submerged in the Department of Energy ("DOE"), has promulgated a comprehensive system of regulations governing the allocation and pricing of petroleum products. *See* 10 C.F.R. Parts 210-212. Regulations pursuant to the EPAA were originally issued on December 27, 1973, 39 Fed. Reg. 744 (1974), and were shortly thereafter comprehensively reorganized and revised, 39 Fed. Reg. 1924 (1974). On January 10, 1975, in clarifying its definition of "covered products" which were subject to price regulation under the EPAA, the Federal Energy Administration ("FEA") emphasized its intention to regulate to the full extent of the authority granted under the Act:

> "With respect to 'covered products' (i.e. those products which are subject to FEA price regulations) the intent of the FEO [Federal Energy Office], and now

> the FEA, has always been to exercise its regulatory authority under the [EPAA] with respect to all products that are subject to that Act. Previous definitions of 'covered products' as set forth in the Mandatory Petroleum Price Regulations were in no way intended to restrict the scope of the price regulations to anything less than all the products subject to the [EPAA]."

40 Fed. Reg. 2795 (1975).[5] Accordingly, as of that date "covered products" subject to price regulation under the EPAA included crude oil, residual fuel oil, and "refined petroleum products," such as gasoline, kerosene, fuel oil and other distillates, refined lubricating oils, diesel fuels, propane, and butane. *Id.*[6]

Congress supplemented the EPAA in 1975 by adding 15 U.S.C. § 760a as part of the amendments enacted under the Energy Policy and Conservation Act, P.L. 94-163. That section authorizes the President to amend the EPAA regulations to exempt the allocation and pricing of "crude oil, residual fuel

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[5]"The interpretation of the agency charged with administration of the statute is, of course, entitled to substantial deference." *Quern* v. *Mandley,* 436 U.S. 725, 738 (1978) (citing *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 421 (1973).

[6]The pervasiveness of federal regulation of the allocation and pricing of petroleum products is illustrated by Executive Order No. 12140, 44 Fed. Reg. 31159 (1979), *as amended by* Executive Order No. 12162, 44 Fed. Reg. 56665 (1979), *reprinted at* 15 U.S.C.A. § 754. When gasoline shortages in 1979 created delays and disruptions at retail gasoline outlets, the need for regulation to protect public safety and order was apparent. Ordinarily, problems such as long lines and minor disorders around gasoline stations would have been a matter for state regulation under the police power. But because of the scope of federal regulation under EPAA, the governors of the various states could take action (*e.g.,* the odd-even system, limitations of each customer's purchase, preferences for certain classes of customers) only after authorization by the President in the cited Executive Order.

oil, or any refined petroleum product or refined product category" from the general price and allocation regulations contained in 10 C.F.R. According to section 760a(c) (2), the President must omit any such amendment for congressional approval and must accompany the submission with a statement of his rationale for the amendment. When proposing to exempt a product from price control, the President is required to state to Congress his finding

> "that competition and market forces are adequate to protect consumers and that exempting such oil or refined product category *will not result in inequitable prices for any class of users of such oil or product.*"

15 U.S.C. § 760a(d) (1) (B) (emphasis added). The President must also send to Congress with each proposed amendment his views as to the "potential economic impact" of the proposed exemption, including, where practicable, his views on "the State and regional impacts of such amendment"; "the effects of such amendment on the availability of consumer goods and services; the gross national product; competition"; and "the effects on...consumer prices." *Id.* § 760a(d) (2).[7] After exempting products, the President may revoke such exemptions if he determines that such revocation is necessary to achieve the federal objectives in the area. *Id.* § 760a(f).[8]

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[7]The requirement that exemptions be submitted to Congress lapsed on May 31, 1979. *See* 15 U.S.C. § 760g; 44 Fed. Reg. 19425 (1979).

[8]Title 15 U.S.C. § 760a(f) provides:

> "With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specification of price or the manner for determining the price, of any such oil or refined product category upon a determination by him that such regula-

Since June 1, 1976, federal energy authorities have lifted federal price controls on residual fuel oil, 41 Fed. Reg. 13896 (1976); middle distillates, 41 Fed. Reg. 24516-18, 34008 (1976); napthas, gas oils, benzene, greases, lubricated base oil stocks, lubricants, solvents, toluene, unfinished oils, xylene, and other finished products, 41 Fed. Reg. 30096 (1976); aviation fuel, 41 Fed. Reg. 40452 (1976), 44 Fed. Reg. 7070 (1979); and butane and natural gasoline, 44 Fed. Reg. 70118 (1979). Before the exemptions enumerated above went into effect, the actions were submitted to Congress pursuant to 15 U.S.C. § 760a(c) (2), and neither the House nor the Senate disapproved of any of them. The DOE and its predecessor agencies in each instance have made it clear that the price and allocation controls have been converted to standby status, with petroleum product markets subject to continuous monitoring and possible future regulatory action.

This case presents two distinct but related questions with respect to the validity of Connecticut's challenged provision, section 13(b). "The first is whether the statute [ ], viewed independently of federal legislation regulating the [petroleum] industry, burden[s] interstate commerce in a manner contrary to the Commerce Clause." *Lewis* v. *BT Investment Managers, Inc.*, 48 U.S.L.W. 4638, 4640 (U.S. June 9, 1980). The second is whether Congress, by its own legislation in this area, has pre-empted the state's legislation. These two barriers to the state's

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tion or order is necessary to attain, and is consistent with, the objectives specified in section 753(b) (1) of this title. Any such oil or refined product category for which allocation or price requirements are reimposed under authority of this subsection may subsequently be exempted without regard to the provisions of subsection (c) of this section [relating to submissions to Congress]."

action overlap to some extent.[9] The nexus between the enterprises of the plaintiffs and their interstate activities would be sufficient to justify an examination into whether section 13(b) impermissibly burdens interstate commerce. Although not wholly preclusive, the Commerce Clause gives Congress the power to regulate commerce among the states. However, because Congress *has* exercised the commerce power in the field of production, distribution, and pricing of petroleum products, it will be more appropriate to consider first whether the state's action must give way in the face of national legislation, which is "supreme" under article VI of the Constitution.

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> "Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce.... Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.
>
> "There is no longer any question that Congress can redefine the areas of local and national predominance...despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. The words of the Clause — a grant of power — admit of no other result. When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition; here we are closer to an intent that can be demonstrated with assurance, although we may employ presumptions grounded in experience in doubtful cases."

California v. *Zook,* 336 U.S. 725, 729 (1949) (citations omitted).

II. THE SUPREMACY CLAUSE

The Supremacy Clause declares the law of the United States to be "the supreme Law of the Land..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. In determining whether a state statute is pre-empted by federal law, and thus invalid under the Supremacy Clause, the Supreme Court has established a two-pronged test. "The first inquiry is whether Congress...has prohibited state regulation of the particular aspects of commerce involved," *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) — that is, whether Congress has "sought to occupy the field to the exclusion of the States," *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978). If Congress has occupied the field, "state laws regulating that aspect of commerce must fall," whether or not they are harmonious with the federal sheme. *Jones* v. *Rath Packing Co., supra,* at 525. Second, "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978). The criterion for determining whether such conflict exists "is firmly established": the court must decide whether the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Jones* v. *Rath Packing Co., supra,* at 526 (quoting *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Although the Supreme Court has attempted various descriptions of the "conflict" required under the second prong of the pre-emption test, it has consistently returned to the formulation enunciated by Mr. Justice Black in *Hines* v. *Davidowitz:* the Court's "primary function is to determine whether, under the circumstances of [the] particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. *Accord, Aronson* v. *Quick Point Pencil Co.,* 440 U.S. 257, 262 (1979); *Ray* v. *Atlantic Richfield Co., supra,* at 158; *Jones* v. *Rath Packing Co., supra,* at 526 (*Hines* test "firmly established"); *DeCanas* v. *Bica,* 424 U.S. 351, 363 (1976); *Perez* v. *Campbell,*

402 U.S. 637, 649-50 (1971). Applying the *Hines* test, the Court has persistently invalidated state legislation that "frustrates the full effectiveness of federal law," *Perez* v. *Campbell, supra,* at 652; that betrays a "general incompatibility with basic federal objectives," *Philadelphia* v. *New Jersey,* 437 U.S. 617, 621 n.4 (1978); or whose "consequences sufficiently injure the objectives of the federal program" to result in "frustration to federal policy." *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 583, 589 (1979). *Cf. White Mountain Apache Tribe* v. *Bracker,* 48 U.S.L.W. 4897, 4901 (U.S. June 27, 1980) (state taxation of non-Indian business operating on reservation lands "would obstruct federal policies" and is pre-empted).

A conflict between state and federal laws may exist despite the absence of literal inconsistency between them. A state regulation will be pre-empted, in other words, not only where federal authorities have promulgated a requirement different from the state's, but where federal authorities have considered the matter and "decided that no such requirement should be imposed at all." *Ray* v. *Atlantic Richfield Co., supra,* at 171-72. The Supreme Court recently reaffirmed that

> "'where failure of...federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation."

Id. at 178 (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.,* 330 U.S. 767, 774 (1947)). If federal authorities have made a considered decision that there should be *no* regulation of a particular subject, in short, *any* state regulation of that subject necessarily conflicts with the federal scheme.

Of course, mere failure to regulate, in and of itself, will rarely constitute an affirmative federal decision that "no such regulation is appropriate or approved" in light of federal policy.

Rather, "[t]he pertinent inquiry [is] whether [federal authorities have] addressed and acted upon the question," whether they have given "careful consideration" to factors specified by Congress, and, after balancing the competing interests, whether they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals. *Ray* v. *Atlantic Richfield Co., supra,* at 174, 177 (holding state vessel-size regulation pre-empted); *National Tank Truck Carriers, Inc.* v. *Burke,* 608 F.2d 819, 824 (1st Cir. 1979) (affirming grant of preliminary injunction against enforcement of state regulation on pre-emption grounds). When federal authorities have taken these steps, it must be assumed that they have thoroughly considered all the arguments in favor of a given type of regulation, yet have concluded, on balance, that the *absence* of regulation will best serve federal objectives.

In sum, a state law will frustrate the full accomplishment of congressional objectives if it directly conflicts with a considered federal determination that a given subject should not be regulated at all. Analysis of the EPAA and its implementing regulations indicates that section 13(b) conflicts in this sense with the federal scheme governing petroleum product pricing.

A. The Federal Regulatory Scheme

1. The EPAA of 1973

The EPAA directed the President to promulgate mandatory regulations governing the price and allocation of all petroleum products. 15 U.S.C. § 753(a). In issuing these regulations, the President was directed to consider nine specific objectives, including "equitable distribution of [petroleum products] at equitable prices," "preservation of an economically sound and competitive petroleum industry," "economic efficiency," and "minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." *Id.* § 753(b) (1) (D), (F), (H), (I). The President, through the authority given him, promptly adopted comprehensive regulations

controlling the price of all petroleum products. 39 Fed. Reg. 1949 (1974).

In the legislative history of the 1973 Act, Congress repeatedly voiced its intention that price controls represent a temporary departure from the free market norm and that they be implemented so as to disrupt the free market as little as possible. The Senate Report, for example, stated that the EPAA

> "emphasizes the objective of minimizing economic distortion, inflexibility and unnecessary interference in market mechanisms. The Committee intends that [price controls] be temporary and limited in scope, and that they not permanently displace the price system as the main tool for allocating resources and products in the petroleum industry. [Section 753(b) (1) (I)] indicates the Committee's preference for price flexibility, competition and decentralized decisionmaking."

S. Rep. No. 93-159, 93d Cong., 1st Sess. 25 (1973). The Conference Report noted that the objective of minimizing market interference "requires special mention":

> "The committee recognizes that [price controls] necessarily distort the economy and interfere with a free market mechanism. It is the intent of this legislation that economic distortion and interference be minimized to the extent practicable. The President should assure himself that his actions interrupt existing supply mechanisms only when necessary to permit the accomplishment of [EPAA] objectives."

H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 24 (1973). *Accord,* H.R. Rep. No. 93-531, 93d Cong., 1st Sess. 19 (1973).

In sum, Congress in 1973 clearly expressed its preference for the free market as the proper determinant of petroleum product prices. It regarded price controls as a necessary but unfortunate — and in all events temporary — departure from that norm.

2. The EPAA Amendments of 1975.

Congress in 1975 added section 12 to the EPAA, 15 U.S.C. § 760a, authorizing the President, by amendment to the regulations, to exempt petroleum products from price controls, and to convert such controls from "mandatory" to "standby" status. *Id.* § 760a(b), (f). Before proposing any exemption, the President is required to determine that "such amendment is consistent with the attainment, to the maximum extent practicable, of [EPAA] objectives...and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives." *Id.* § 760a(b). Any proposal to exempt a petroleum product from price controls must be supported by findings that "competition and market forces are adequate to protect consumers and that exempting [such product] will not result in inequitable prices for any class of users." *Id.* § 760a(d)(1)(B). The President is required to assess the state and regional impacts of any exemption, as well as its effects on competition, small business, unemployment, consumer prices and the Gross National Product. *Id.* § 760a(d)(2). The President is authorized to reimpose price controls at any time, without congressional approval, if he deems them "necessary to attain [EPAA] objectives." *Id.* § 760a(f).

In the legislative history, Congress emphasized that the President must make two distinct determinations when proposing to exempt a petroleum product from price controls. Under section 760a(b), an exemption is permitted only "(1) if [the President] determines that the amendment is consistent...with the attainment of [EPAA] objectives...and (2) if he *also* determines that the regulation, as amended, provides for the attainment of those objectives to the maximum extent practicable." H.R. Rep. No. 94-340, 94th Cong., 1st Sess. 59 (1975) (emphasis added). The President, in other words, must find *both* that exemption from price controls will not impair realization of national energy goals *and* that the absence of price controls will affirmatively provide for the attainment of those goals in the best possible way.

The legislative history repeatedly confirms Congress' view that exemption from EPAA regulation represents an affirmative federal decision that petroleum product prices be set by the free market. The reports describe the exemption procedure as effecting "a gradual return to an unregulated market," S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 203 (1975), and as "phasing from a regulated to an unregulated market system." H.R. Rep. No. 94-340, at 57. Both houses expressed their intention that gradual price decontrol, subject to the President's power to reimpose controls should future crises arise, would work "a smooth transition of petroleum markets from a controlled state to an uncontrolled status subject only to standby authority." H.R. Rep. No. 94-340, at 58. *Accord,* S. Rep. No. 94-516, at 204.

Congress clearly expressed its preference, moreover, that a petroleum product, once returned to the free market, should remain free of price controls indefinitely. The House Report noted that, under the 1973 EPAA, the President was permitted to propose tempoary 90-day exemptions, after which time price controls would automatically revert. Pub. L. No. 93-159, § 4(g)(2), 87 Stat. 633. This procedure, the Report explained, was inadequate, for

> "potentially grave dislocations could result as an oil or product which had been subject to controls and exempted from those controls, is resubjected to controls. For the conversion to standby authority mechanism to be meaningful, some degree of stability and certainty regarding the status of an oil or product must be assured."

H.R. Rep. No. 94-340, at 57. In enacting the new section 760a exemption procedure, therefore, Congress clearly intended that price controls, once removed, should be reimposed only if the President found it absolutely necessary, lest the "stability and certainty" of petroleum markets be upset to the detriment of EPAA goals.

Congress thus made its intentions perfectly clear when it enacted the present EPAA exemption procedure in 1975. Both in the statute itself and in the legislative history, Congress expressly declared that the exemption of a given petroleum product from price controls would constitute an affirmative federal decision that EPAA objectives required the price of such product to be set by a free market, subject only to standby federal controls.

3. Administrative Implementation of Exemptions.

Pursuant to statute, the President has delegated his authority under the EPAA to the DOE and its predecessor, the FEA. 15 U.S.C. § 754(b); Executive Order 11790, 39 Fed. Reg. 23185 (1974), *as amended by* Executive Order 12038, 43 Fed. Reg. 4957 (1978). Following the procedures outlined in section 760a, those agencies have exempted from price controls all petroleum products except automotive, gasoline, propane, and certain natural gas liquids. 10 C.F.R. §§ 210.35, 212.56-.62. Analysis of these administrative proceedings makes clear that the decision to exempt has in each case "take[n] on the character of a ruling that no such regulation is appropriate or approved pursuant to [EPAA] policy," *Ray* v. *Atlantic Richfield Co., supra,* at 178, and that prices should be set, as Congress envisioned, by the free market. *See* 41 Fed. Reg. 7122-24 (1976) (residual fuel oil); 41 Fed. Reg. 24517 (1976) (middle distillates); 44 Fed. Reg. 7066 (1979) (aviation fuels); 44 Fed. Reg. 70118 (1979) (butane and natural gasoline).

In each case, federal officials explicitly determined (1) that an end to price regulation was *necessary* to achieve EPAA objectives and would affirmatively facilitate the attainment of those objectives to "the maximum extent practicable"; and (2) that petroleum prices should be set by a market free from regulatory constraints. With respect to each exempt product, federal officials "addressed and acted upon the question" of price controls, gave "careful consideration" to the factors specified by Congress, and, after balancing the competing interests, "decided that no such requirement should be imposed at all."

Ray v. *Atlantic Richfield Co., supra,* at 171-72, 174, 177. The exemption decision, in short, has uniformly " 'take[n] on the character of a ruling that no [price] regulation is appropriate or approved pursuant to the policy of the [EPAA].' " *Id.* at 178 (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd., supra,* at 774).

Thus, the petroleum products presently exempt from federal price regulation are not exempt because Congress, the President, and the DOE are no longer concerned with them. Rather, as the history accompanying each amendment makes clear, an unregulated market system has been chosen deliberately as the federal policy for these products. Moreover, this deliberate and continuing federal policy is evident from the authority of the President and his delegates to reimpose direct price regulation, if they determine that the revocation of exemptions becomes necessary to achieve the federal objectives in the area.

B. Section 13(b) Directly Conflicts With the Federal Policy Embodied in the EPAA

Section 13(b) of the Act represents an attempt by Connecticut to regulate the market price of petroleum products and is thus a form of price control.[10] *See Schirtzinger* v. *Dunlop,* 489 F.2d 1307, 1310 (Temp. Emer. Ct. App. 1973) (treating pass-through provisions as price regulation). This price control mechanism operates only on petroleum products "exempt from [the EPAA]." In thus confining the operation of section 13(b),

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[10]It is no answer for the state to contend that section 13(b) merely provides a *method* for recovering the tax paid under section 1. That the plaintiffs can recoup the cost of the tax via the route permitted under section 13(b) does not render that provision any less a price regulation. It distorts market conditions by keeping prices artificially low in Connecticut. At the same time, it encourages an artificial price hike in other states along the eastern seaboard. This is precisely one of the evils that the EPAA sought to combat. *See* note 4 *supra;* note 13 *infra.*

the Connecticut General Assembly may have drawn the inference that federal authorities, by removing price controls from certain petroleum products, intended to permit the states to regulate the price of such products as they saw fit. However, analysis of the EPAA, its legislative history, and its administrative implementation reveals that "exemption" — far from relinquishing petroleum product pricing to state regulation — constitutes an affirmative federal decision that petroleum products should be free from *all* price regulation, and that EPAA objectives will best be served by an unregulated free market subject only to standby federal controls. Section 13(b) is plainly in direct conflict with the federal regulatory scheme outlined above — *i.e.*, it directly conflicts with the federal determination reached by the President and approved by Congress, that such products should be free of price regulation and their prices established by an "unimpeded free market."[11]

Section 13(b) "frustrates the full effectiveness of federal law" in several ways. *Perez* v. *Campbell, supra,* at 652. In 1975, Congress warned of "potentially grave dislocations" that could result if controls exempted from price regulation were "resubjected to controls," stressing that market stability and certainty" were essential to the federal standby regulatory scheme. Section 13(b), by subjecting federally exempt products to a new form of price control, risks just such dislocations. By prohibiting suppliers from raising their prices in Connecticut by more than an arbitrary "average" amount, regardless of supply/demand or cost factors that might call for higher prices in Con-

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[11]The EPAA contains no express provision pre-empting state laws governing petroleum product *pricing. But cf.* 15 U.S.C. § 755(b) (pre-empting state allocation laws that conflict with federal regulations). The Supreme Court has explicitly held, however, that, even if a given state law is not covered by a federal statute's express pre-emption provision, the Court "still must determine whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Jones* v. *Rath Packing Co., supra,* at 540-41, *i.e.*, whether the state law is invalid on "conflict" grounds.

necticut, section 13(b) will create the "artificial market conditions" that FEA labeled "extremely detrimental to the nation." *Findings and Views Concerning the Exemption of Middle Distillates from the Mandatory Petroleum Allocation and Price Regulations* 125 (June 15, 1976). By preventing suppliers from fully recovering, through prices charged in Connecticut, the true economic cost of products sold in Connecticut, section 13(b) will induce suppliers to sell their products in other states, risking the very "supply problems" and "market distortions" that DOE, in removing controls, endeavored to eliminate. Section 13(b), in short, tampers with the "free market" in just the way Congress wished to avoid: it results in "economic inefficiency" and "unnecessary interference with market mechanisms" in flat defiance of the explicit statutory goals of the EPAA.

There can be no doubt that section 13(b) of the Act directly conflicts with the federal energy policy embodied in the EPAA. Because it subjects to price regulation petroleum products that federal authorities have decided should be free of price regulation, section 13(b) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the EPAA. *Hines* v. *Davidowitz, supra,* at 67. Accordingly, under the test for pre-emption enunciated by the Supreme Court, section 13(b) is invalid under the Supremacy Clause.

It is within neither this court's realm nor its competence to evaluate the wisdom of federal energy policy, nor the economic theories that underlie it.[12] Suffice it to say, the question whether the plaintiffs could "afford" to bear alone the tax imposed by section 1 of the Act is irrelevant to the decision in this case, as are arguments proffered by the *amici* who contend

[12]According to those theories, section 13(b)'s price restraints will not deter consumption of energy; at the same time, they will remove incentives to explore for and produce alternative sources of petroleum when the country's need is for larger domestic oil supplies and independence from foreign oil.

that the tax cost could and ordinarily would be spread throughout the several states. All this may be so.[13] But inasmuch as section 13(b) contravenes federal policy by attempting to regulate the price that may be charged in Connecticut for the affected petroleum products, that provision cannot stand.

III. RELIEF

The plaintiffs have asked for both declaratory and injunctive relief against the implementation and enforcement of section 13(b). The irreparable injury required for an injunction, however, could only have been said to exist, if at all, while the plaintiffs awaited a final decision in this action. Moreover, a declaratory judgment will afford the plaintiffs full and complete relief,[14] since "a judgment of this court would probably have

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[13]The latter point, however, is of doubtful validity. In Mobil Petroleum Co., No. FEE-4296 (June 23, 1977), DOE granted Mobil's application for permission to pass on the cost of Guam's gross receipts tax on retail sellers entirely to Guamanian consumers. DOE reasoned that to spread the cost of the tax wherever Mobil does business would be "inequitable" and thus "would frustrate one of the objectives that Congress sought to further in the [EPAA], that of providing for the 'equitable distribution of...refined petroleum products at equitable prices among all regions and areas of the United States.'" *Id.* at 6.

The Connecticut General Assembly was well aware of the Guam decision when it adopted section 13(b). Proceedings of the House of Representatives at 143-44 (Apr. 11, 1980) (remarks of Rep. Emmons); *id.* at 174 (remarks of Rep. Van Norstrand); Proceedings of the Senate at 75-76, 77-78 (remarks of Sen. Johnson). But as the Supreme Court has often recognized in the Commerce Clause context, "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 n.2 (1945) (citations omitted).

[14]Irreparable injury is not a prerequisite to the issuance of declaratory relief. *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 241 (1937).

the same effect upon Connecticut state officials as an injunction." *Arrow Lakes Dairy, Inc.* v. *Gill,* 200 F. Supp. 729, 737 (D. Conn. 1961). Such an injunction, if it later proves to be necessary, may be sought under 28 U.S.C. § 2202. Hence, it is declared that section 13(b) of Connecticut Public Act 80-71 is unconstitutional in that it is pre-empted by federal law and thus violates the Supremacy Clause.[15]

Let judgment enter accordingly. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 9th day of July, 1980.

/s/ M. Joseph Blumenfeld
M. Joseph Blumenfeld
Senior United States District Judge

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[15]The declaratory judgment issued herein does not affect the validity of the tax enacted by section 1 of the Act, since the Act contains a severability clause in section 15.

The fact that a severability clause was included casts doubt on the ingenuousness of the state's argument that the tax was intended by the legislature to be assessed on the plaintiffs themselves. Section 15 makes it evident that the state's primary interest was in the *collection* of the tax. Who would bear the burden was of only secondary significance to the legislature.

Furthermore, Connecticut's tax is not earmarked for any particular purpose whatsoever; its yield goes entirely to the general fund. Even if the court were disposed to undertake a Commerce Clause analysis, it could discern no relationship between section 13(b) and the state's purported interest in safety, health, or the reputable operation of the business carried on by the plaintiffs. The state's suggestion that price restraints are necessary to protect the health of home heating oil users could just as well apply to food, soap, or any other product necessary to consumers' health and safety. And surely that goal does not require regulation of the price of jet fuel, lubrication oil, or the many other products affected by section 13(b).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 482 — September Term, 1980
Argued October 30, 1980 — Decided January 28, 1981
Docket No. 80-7785

MOBIL OIL CORP., ATLANTIC RICHFIELD CO., UNITED REFINING CO., INC., and GULF OIL CO., CHEVRON U.S.A. INC., AMOCO OIL CO., TEXACO INC. and EXXON CORP.,

Plaintiffs-Appellees,

— against —

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

NEW ENGLAND PETROLEUM CORP.,

Plaintiff-Appellee,

— against —

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants.

AMERADA HESS CORP.,

Plaintiff-Appellee,

— against —

JAMES H. TULLY, JR., THOMAS H. LYNCH and FRANCIS KOENIG, Constituting the NEW YORK STATE TAX COMMISSION; ROBERT ABRAMS, Attorney General of the State of New York, and JAMES LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges, and WERKER, District Judge.*

Appeal from an order of the United States District Court for the Northern District of New York, Judge Neal P. McCurn, declaring the anti-passthrough provision of New York State's tax upon the gross receipts of oil companies doing business within the State to be preempted by the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. and the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, and enjoining the enforcement thereof.

Affirmed as to the inapplicability of the Tax Injunction Act, 28 U.S.C. § 1341, dismissed as to the preemption issue.

THOMAS R. TROWBRIDGE, III, New York, N.Y. (Donovan Leisure Newton & Irvine, New York, N.Y.; JOHN M. FREYER, Syracuse, N.Y. (Bond, Schoeneck & King, Syracuse, N.Y., of counsel), for Plaintiffs Mobil Oil Corporation, Atlantic Richfield and United Refining Company.

EDWARD F. GERBER, Syracuse, N.Y. and ARTHUR C. VANGELI and SYDNEY M. AVENT, Bala Cynwyd, Pa., of counsel), for Gulf Oil Corporation.

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*United States District Judge for the Southern District of New York, sitting by designation.

GEORGE WEISZ, New York, N.Y. (Cleary Gottlieb Steen & Hamilton, New York, N.Y., JAMES C. BLAIR, New York, N.Y.; WARNER BOUCK, Albany, N.Y., Bouck Holloway & Kiernan, Albany, N.Y., of counsel) for Plaintiff New England Petroleum.

STANLEY D. ROBINSON, New York, N.Y. (Kaye Scholer Fierman Hays & Handler, New York, N.Y.; WILLIAM L. ALLEN, JR., Syracuse, N.Y., Hancock, Estabrook, Ryan Shove & Hust, Syracuse, N.Y., of counsel) for Plaintiff Amerada Hess Corporation.

EDWARD COSTIKYAN, New York, N.Y. and SIMON H. RIFKIND, New York, N.Y. (Paul Weiss Rifkind Wharton & Garrison, New York, N.Y., of counsel) for Defendants Tully, Lynch and Koenig.

SHIRLEY ADELSON SIEGEL, Albany, N.Y. (Solicitor General, State of New York, of counsel) for Robert Abrams and Defendant LaRocca.

MULLIGAN, Circuit Judge:

On June 18, 1980, New York Governor Hugh Carey signed into law two bills, Senate Bills 10188 and 10261, which created a new Section 182 of the New York Tax Law and established a 2% tax on the "gross receipts" of oil companies doing business in New York. 1980 N.Y. Laws, ch. 271, 272 (N.Y. Act); N.Y. Tax Law § 182 (McKinney Supp. 1980). The express purpose of the tax is to raise additional revenue to aid the State's ailing public transportation system. N.Y. Act, ch. 272 § 1. Indeed, it has been estimated by the New York State Division of the Budget that the new tax would raise an additional 235 million dollars annually. Oil companies were reported to have reaped unjustifiably high profits as a result of market conditions and were therefore deemed to be an appropriate source of revenue. N.Y. Act, ch. 272 § 1. In order to ensure that the oil companies,

and not the consuming public, bore the burden of the tax, the legislature provided in Section 4(12) (a) of the Act (the anti-passthrough provision) that:

> [t]he tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y. Tax Law § 182(12) (a) (McKinney Supp. 1980). Companies which are found to have passed on the cost of the tax through product pricing are subject to a penalty equal to 100% of the tax liability for the year in which the violation occurs. N.Y. Tax Law § 182(12) (b) (2). In addition, the legislature hinged the viability of the tax itself upon the validity of the anti-passthrough provision. In 1980 N.Y. Laws, ch. 272, § 5 (the self-destruct provision), the legislature provided that:

> [i]f the provisions of [the anti-passthrough section] is [sic]: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212) promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect [ten days thereafter].

The plaintiffs-appellees, ten oil companies concededly subject to the tax, instituted these actions in the Northern District of New York against the defendants-appellants, New York

State Tax Commission, New York State Attorney General and the Commissioner of the New York State Energy Office, seeking declaratory and injunctive relief. The oil companies argued that the anti-passthrough provision was invalid (a) because it conflicted with the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, et. seq. (EPAA) and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, issued thereunder and was therefore preempted by the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2); and (b) because it violated the Commerce and Due Process Clauses of the United States Constitution. At no time did the plaintiffs attack the validity of the tax itself. The plaintiffs, after expedited discovery, moved for summary judgment while the defendants moved to dismiss the actions for lack of federal jurisdiction under 28 U.S.C. § 1341, the Tax Injunction Act. By order dated September 4, 1980, the District Court denied the defendants' motion to dismiss and granted summary judgment in favor of the plaintiffs.

In a memorandum and decision dated September 19, 1980, Judge Neal G. McCurn held that the anti-passthrough provision was in effect a price control and not a rule of tax incidence. *Mobil Oil Corp.* v. *Tully,* No. 80-CV-543, slip op. at 10 (N.D.N.Y. September 19, 1980). The court therefore held that the Tax Injunction Act, 28 U.S.C. § 1341 was inapplicable. *Id.* In addition, because the "price control" provision was found to be in conflict with the EPAA and the regulations issued thereunder, Judge McCurn declared that the provision was preempted by federal law with respect to exempt and non-exempt petroleum products. *Id.* at 37, 43. Judgment was entered on September 19, 1980 but on motion by the defendants-appellants, the District Court stayed enforcement until October 31, 1980. *Mobil Oil Corp.* v. *Tully,* No. 80-CV-543 (N.D.N.Y. September 28, 1980). The stay was continued by this court in a ruling from the bench at oral argument on October 30, 1980.

The defendants-appellants appeal from Judge McCurn's order denying their motion to dismiss and granting the plaintiffs-appellees' motion for summary judgment. The appellees

have moved before this court to dismiss the appeal for want of appellate jurisdiction. Arguing that this case "arises under" the EPAA, the appellees' position is that exclusive jurisdiction over all issues in this case is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of Section 5 of the EPAA, 15 U.S.C. § 754(a) (1), which incorporates the review provisions of Section 211(b) (2) of the Economic Stabilization Act. 12 U.S.C.A. § 1904, note (West Supp. 1980). Thus, this case and its companion case was decided today, *Mobil Oil Corp.* v. *Dubno,* No. 80-7677, slip op. _____ (2d Cir.) require an analysis of the appropriate allocation of appellate jurisdiction between a court of appeals and the TECA.

I

The Motion to Dismiss

(a) Preemption

The threshold issue on this appeal is whether this court has jurisdiction to hear it. The appellee oil companies have argued that Section 211(b) (2) of the ESA, 12 U.S.C.A. § 1904, note (West Supp. 1980), provides that the Temporary Emergency Court of Appeals (TECA) has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [ESA]." Section 5 of the EPAA, 15 U.S.C. § 754(a) (1), incorporates by reference the jurisdictional provisions of § 211 of the ESA where there is judicial review of the regulations promulgated under Section 753(a) of the EPAA (mandatory allocation of crude oil, residual fuel oil and refined petroleum products) as well as any order or action taken by the President or his delegate under the chapter.

In *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179 (2d Cir. 1979) we held that a case or controversy arises under the ESA or EPAA where the district court has adjudicated an "ESA issue." (The court used that expression to mean issues involving the ESA and the EPAA as well as regulations promulgated under both statutes. *Id.* at 182 n.3).

The Tenth Circuit has indicated that an ESA issue is one "involving the construction, applicability and effect" of the EPAA, *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

The preemption issue presented here does present an EPAA question which was adjudicated in the District Court and is thus within TECA's exclusive appellate jurisdiction. A major contention of the oil companies was that Section 182(12) (a) of the New York Tax Law prohibiting the passthrough of the two percent gross receipts tax was unconstitutional as a state price control rule which conflicted with the EPAA and the provision thus void under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2). To make the determination that the state law conflicted with the federal regulations, as Judge McCurn found, necessitates "a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder." *Mobil Oil Corp.* v. *Tully,* supra, slip op. at 6. The trial judge proceeded therefore to analyze in detail the federal statute and regulations to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy. *Id.* at 17-43. Whether that analysis was correct is not properly before this court since in making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations.

The appellants argue that the preemption claims arise under the Constitution rather than the EPAA and thus do not pose an EPAA question. The argument is not persuasive. In *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), the Supreme Court held that the issue of preemption did not involve a substantial constitutional question so as to warrant the convening of a three judge court pursuant to 28 U.S.C. § 2282. The Court declared that the basic question involved in a preemption case "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Id.* at 120. See also *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946).

This Court has made a similar analysis in *Andrew* v. *Maher*, 525 F.2d 113, 119 (2d Cir. 1975).

> "While [the Supremacy Clause] is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate."

It is obvious that in this case the trial court was obligated to and did make an analysis and interpretation of the two statutory schemes involved here, both state and federal. Having found that an impermissible conflict existed between the anti-passthrough provision and the federal statute, regulations and congressional policy, the finding of preemption was automatic. Appellants further argue that if arguendo the District Court did have exclusive jurisdiction in all suits arising under the EPAA, then it should not have adjudicated that issue but rather it should have followed the statutory mandate of Section 211(c) and made a determination as to whether a substantial constitutional question exists" and if so "certify such issue to [TECA]." While our analysis would indicate that the substantial issue was statutory and regulatory analysis and interpretation rather than constitutional, the short answer to the contention is that the certification issue is a determination to be made by TECA and not this court. *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), cert. denied, 444 U.S. 879 (1979).

Appellants' further argument that an EPAA question is one limited to cases and controversies involving a regulation promulgated under Section 753(a) and not to all cases or controversies arising under the EPAA itself is at odds with our statutory interpretation in *Coastal States Marketing* v. *New England Petroleum Corp., supra.* Here the District Court did analyze and apply the statute, the regulations and the underlying congressional policy. The District Court further made an adjudication resting on its interpretation of that federal scheme. It therefore decided an EPAA issue sufficient to vest TECA by statu-

tory mandate with exclusive jurisdiction of this appeal on the preemption issue.

(b) The Anti-Injunction Act

The oil company appellees' motion to dismiss the appeals on jurisdictional grounds is also addressed to the second issue on this appeal — that 28 U.S.C. § 1341, the Tax Injunction Act, deprived the District Court of jurisdiction. The appellants argue that the determination of the District Court that 28 U.S.C. § 1341 did not deprive it of jurisdiction was erroneous. The appellees contend, however, that the issue was ancillary to the EPAA question and therefore within TECA's exclusive appellate jurisdiction. We disagree with both arguments.

Section 1341 precludes the district courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is apparent that the inquiry of the District Court on this issue did not require any analysis of the EPAA or its regulations. It required solely an interpretation of a state statute to determine whether or not an injunction, suspension or restraint was proscribed by the federal statute. Appellees seemingly recognize this but denominate it as an issue ancillary to the EPAA preemption question and therefore within TECA's exclusive jurisdiction.

In a comparable setting TECA has declined to jurisdiction. In *Texaco, Inc.* v. *Department of Energy,* 616 F.2d 1193 (TECA 1979) TECA declined to accept jurisdiction to review a District Court holding that the Federal Energy Regulatory Commission had review authority under the Department of Energy Organization Act even though the DOE actions which were to be reviewed by the FERC were taken under the EPAA. The court reasoned that since the District Court's only decision was that the FERC had review authority, which was under the DOE Act and not the EPAA, it could not exercise jurisdiction since it involved the interpretation of a statute not within the review

provisions of 15 U.S.C. § 754(a). The court stated, "...TECA has repeatedly refused to exercise jurisdiction over issues or claims not arising under the EPAA even though they may be joined in the same case with other issues or claims that do arise under the EPAA." *Id.* at 1196.

Here the federal statutory prohibition is plainly not within the EPAA and the refusal of TECA to exercise such jurisdiction is reasonably to be anticipated. Obviously, the TECA position can result in bifurcated appeals as it will in this case but that has been anticipated by this court in *Coastal States Marketing* v. *New England Petroleum Corp., supra,* 604 F.2d at 185. It is desirable to defer to a specialized federal appellate court, TECA, with its special expertise on EPAA issues, which in this appeal, includes the preemption question involving analysis of the congressional intent in enacting the EPAA and the interpretation of the regulations adopted pursuant thereto.

The oil companies rely upon several TECA holdings where TECA did take jurisdiction over ancillary non-EPAA issues so that it could "perform...the normal and necessary functions of any court." *Quincy Oil Inc.* v. *Federal Energy Administration,* 620 F.2d 890, 893 (TECA 1980). However, TECA has exclusive jurisdiction only over EPAA issues. *Coastal States, supra,* 604 F.2d at 181. This Court as a court of appeals has concurrent jurisdiction in an appeal from a final order of a District Court over independent issues which do not present an EPAA question. *Id.* at 186. The Section 1341 question is substantial and is independently appealable to this court. The oil company's reliance on *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp.,* 531 F.2d 669 (2d Cir. 1976) is misplaced. That case did involve an appeal from an EPAA question which was within the exclusive jurisdiction of TECA as well as an ancillary issue — an appeal from an interlocutory order of the District Court refusing to transfer the action to another District Court. Our dismissal was based on the proposition that a ruling on a transfer motion is not independently appealable under 28 U.S.C. § 1291(a) (1). In this case the Section 1341 issue is independent and severable

from the EPAA question and presents us with an appealable order from a ifnal order of the District Court.

We conclude therefore that the motion to dismiss the appeal on jurisdictional grounds is granted with respect to the preemption question and denied as to the Section 1341 issue.

II

Having determined that the preemption issue is within the exclusive jurisdiction of TECA and that the applicability of the Tax Injunction Act is properly before this court, we address the latter issue. Section 1341 is brief and facially clear:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The position of the State defendants is essentially that the order of the District Court has effectively restricted the "assessment, levy or collection" of a New York State Tax and is thus within the clear proscription of Section 1341. The oil companies argue that they do not at all challenge the validity of the tax but simply the anti-passthrough provisions which they denominate as an exercise not of the taxing power of the State but rather its police power. The anti-passthrough provision, they urge, is a price fixing statute and not a taxing device. While the statutory linkage between the validity of this provision and the continued existence of the tax does result in the frustration of the State's power to collect the tax, this was the calculated decision of the legislature and not the result of the court's determination. While the briefing and argument on this issue has been intensive, there is no authority precisely in point.

The State appellants argue that Section 182(12) (a) is a state tax law and that the State has the authority to select the target of the tax. They rely upon language in *First Agricultural National Bank* v. *Tax Commission,* 392 U.S. 339, 347-48 (1968)

where the Court held invalid a Massachusetts statute which imposed a sales tax upon a national bank. In the course of its opinion the Court construed the state statute as imposing the legal incidence of the tax upon the purchaser rather than the vendor. The Massachusetts State Court from which the appeal originated had construed the statute to impose the tax on the vendor. In reviewing, the court stated "[t]here can be no doubt from the [express] wording of the statute that the Massachusetts legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." *Id.* at 348. It is difficult to understand how the State can reasonably construe this language to be helpful here. There was no Section 1341 issue in that case at all — the appeal was not from a district court but a state court. No one questions the right of the State of New York to place the legal incidence of the tax upon the oil companies — but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product.

As we have indicated the tax purpose of the legislation was to raise funds for the mass transit system. However the purpose of the anti-passthrough provision was not to raise taxes but "to do nothing that will contribute to further increases in the price of petroleum products to (New York) consumers" and "to prevent such gross receipts tax from fueling inflation by prohibiting the passthrough of such tax to the consumers of this state." N.Y. Act, ch. 272, § 1.

This objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products. We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs from the consumer directly or indirectly, the State has gone beyond its taxing powers and has employed its police powers. Whether this is appropriate is not the issue before us; whether it results in a collison with EPAA is for TECA. We simply hold that that action is not insulated from federal scrutiny by section 1341.

section 1341.

The mere fact that the anti-passthrough section is contained in a tax law of the State should not lead to automatic santuary under Section 1341. In *Wells* v. *Malloy,* 510 F.2d 74 (2d Cir. 1975), this court held that a District Court was not prevented from considering the constitutionality of a Vermont Motor Vehicle Tax which provided for the suspension of a motor vehicle license if the owner failed to pay the tax due under the state law. An indigent claimed that such suspension created irreparable and immediate hardship and harm to him in violation of his equal protection rights under the fourteenth amendment. This court found that his attack did not seek a restraint upon the assessment, levy or even the collection of the tax.

That the attack of the oil companies is not on those sections of Section 182 which provide for the assessment, levy or collection of the tax within the prohibition of Section 1341, is bolstered by the statement of James H. Tully, Jr., Commissioner of Taxation and Finance of the State of New York in his affidavit in support of a stay which states in part that the plaintiffs "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." He further stated that anti-passthrough provision "is all that the court enjoined."

We agree therefore with the District Court that the anti-passthrough provision is not an exercise of the taxing power of the State within Section 1341 but rather of its police powers directed to its express concerns about inflation and rising fuel costs. A constitutional attack under the Supremacy Clause on that aspect of the law is not within Section 1341.

Having so held we need not address the issue of whether or not a plain, speedy and efficient remedy may be made in the courts of this State.

The stay of enforcement is continued by this court and shall continue only until such time as the State can seek a stay from TECA. Any motion for further relief should be directed to that court.

80-1813

Office-Supreme Court, U.S.
FILED
APR 28 1981
ALEXANDER L. STEVAS,
CLERK

No.

In The

Supreme Court of the United States

October Term, 1980

OREST T. DUBNO, Commisioner of Revenue Services
of the State of Connecticut, et al,
Petitioner

vs.

MOBIL OIL CORPORATION, et al.,
Respondent

CARL R. AJELLO, Attorney General
of the State of Connecticut, et al,
Petitioner

vs.

TEXACO INC., et al
Respondent

ELLA T. GRASSO, Governor of the State of Connecticut, et al
Petitioner

vs.

AMERADA HESS CORPORATION
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VOLUME II

TABLE OF CONTENTS

	Page
APPENDIX A Opinion Of Court Of Appeals	1a
APPENDIX B Opinion Of District Court	8a
APPENDIX C Opinion Of Court Of Appeals In Companion Case (*Mobil, et al* v. *Tully*)	29a
APPENDIX D Connecticut Public Act No. 80-71	43a
APPENDIX E Emergency Petroleum Allocation Act With Amendments As Codified	46a
Correspondence Between Respondents Mobil And U.S. Department Of Energy, Wherein, D.O.E. Express Its Opinion That Section 13(b) Of Conn. P.A. 80-71 Is Not Preempted By E.P.A.A.	82a
APPENDIX F Section 211 Of The Economic Stabilization Act Of 1970 As Codified In Note To 12 U.S.C.A. §1904 ..	86a
APPENDIX G Tax Injunction Act, 28 U.S.C. §1341	91a

APPENDIX D

Connecticut
PUBLIC ACT NO. 80-71

AN ACT CONCERNING STATE REVENUE FOR THE FISCAL YEAR COMMENCING JULY 1, 1980.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) Any petroleum company which is engaged primarily in the refining and distribution of petroleum products and distributes such products to wholesale and retail dealers for marketing and distribution in this state shall pay a quarterly tax at the rate of two percent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products in this state. No deduction shall be made from such gross earnings for any commission, rebate or other payment, except a refund resulting from an error or overcharge. Each such company shall, on or before the last day of January, April, July and October of each year, render to the commissioner of revenue services under oath of its treasurer or the person performing the duties of treasurer or of an authorized agent or officer, a return on forms prescribed or furnished by said commissioner, including in respect to such company the amount of gross earnings from the sale of petroleum products within this state for the quarter ending with the last day of the preceding month. The tax imposed under this act shall be in addition to any other tax imposed by Connecticut with respect to which such company is liable. For purposes of sections 1 to 16, inclusive, of this act "petroleum products" includes any product which contains or is made from petroleum or a petroleum derivative and "gross earnings" are those earnings from the sale of petroleum products to which the sales factor is applied under subdivision (3) of section 12-218 of the general statutes and those earnings from such sales made by any corporation in which any such petroleum company owns not less than twenty-five percent of the stock of such corporation.

* * *

Sec. 7. (NEW) The tax imposed under section 1 of this act shall be due and payable upon the last day upon which a return may be filed without penalty under said section 1. Upon the filing of such return, the full amount of the tax payable, as the same is computed by the taxpayer, shall be paid to the commissioner of revenue services in cash or by check, draft or money order drawn to the order of the commissioner of revenue services. Said commissioner shall, within three years after the due date for filing such return, or in the case of a completed return filed after such due date, within three years after the date on which such return was received by said commissioner, examine it and in case any error is disclosed by such examination, within thirty days after such disclosure, notify the taxpayer thereof. Within thirty days of the mailing of such notice, the taxpayer shall pay to said commissioner, in cash or by check, draft or money order drawn to the order of the commissioner of revenue services, any additional amount of tax shown to be due by the corrected return or shall be paid by the state treasurer, upon order of the comptroller, any amount shown to be due such taxpayer by such corrected return. The failure of such taxpayer to receive any notice required by this section shall not relieve such taxpayer of the obligation to pay the tax imposed under section 1 of this act or any interest or penalties thereon. When, before the expiration of the time prescribed in this section for the examination of the return or the assessment of said tax, both said commissioner and such taxpayer have consented in writing to such examination or assessment after such time, the return may be examined and said tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. Said commissioner may also in such a case waive the statute of limitations against a claim for refund by such taxpayer.

* * *

Sec. 13. (NEW) (a) It is not the intention of the general assembly that the tax imposed under section 1 of this act be con-

strued as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies.

(b) No petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company raises its wholesale rack price for such product in all ports on the eastern coast of the United States.

* * *

Sec. 15. (NEW) If any section, part, clause or phrase in sections 1 to 16, inclusive, of this act, is for any reason held to be invalid or unconstitutional, sections, parts, clauses and phrases in said sections not held to be invalid or unconstitutional shall not be affected and shall remain in full force and effect.

* * *

Sec. 30. This act shall take effect July 1, 1980, provided (1) sections 1 to 16, inclusive, shall be applicable to calendar quarters commencing on or after July 1, 1980, (2) sections 22, 25, 26, 27 and 29 shall take effect from passage and (3) section 28 shall take effect January 1, 1981.

APPENDIX E

Emergency Petroleum Allocation Act with Amendments as Codified

§ 751. Congressional findings and declaration of purpose

(a) The Congress hereby determines that —

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

Pub.L. 93-159, § 2, Nov. 27, 1973, 87 Stat. 628.

§ 752. Definitions

For purposes of this chapter:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to —

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B) and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with, or affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to November 27, 1973,

more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Pub.L. 93-159, § 3, Nov. 27, 1973, 87 Stat. 628.

§ 753. Mandatory allocation

Authority to promulgate regulations covering crude oil, residual fuel oil, and refined petroleum products

(a) Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or deter-

mined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

Requisite areas of coverage for regulations; price regulations; unobtainability or curtailment of other fuels; limitations on pricing policy

(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for —

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of —

(i) fuels, and

(ii) minerals essential to the requirements of the United States.

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section —

(A) shall provide for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level;

(B)(i) shall not permit any net crude oil cost increases —

(I) which are incurred by a refiner during the calendar month immediately preceding the effective date of this paragraph, or in any month thereafter, and

(II) which are not passed through in prices charged pursuant to such regulation in the 2 calendar months following the calendar month in which such crude oil cost increases were incurred,

to be passed through by such refiner in any month subsequent to the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless the President makes the findings specified in clause (ii)(III)(aa), and such passthrough is consistent with the requirements specified in clause (ii)(II)(bb).

(ii) shall not permit the passthrough in any month of —

(I) any net crude oil cost increases incurred by a refiner not later than the last day of the calendar month which begins two months prior to the effective date of this paragraph and not passed through by the end of the last calendar month prior to the effective date of this paragraph unless such passthrough is not in excess of 10 percent of the total amount of such increased crude oil costs not passed through as of the last day of the last calendar month prior to the effective date of the amendment promulgated under section 757(a) of this title; and

(II) any net crude oil cost increases incurred by a refiner after the effective date of this paragraph, which net crude oil cost increases were not passed through within the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless —

(aa) the President finds, and reports to the Congress with respect to such findings, that a passthrough of such crude oil cost increases is necessary to allevi-

ate the impact on refiners, marketers, or consumers of significant increases in costs, to provide for equitable cost recovery consistent with the attainment, to the maximum extent practicable, of the objectives specified in paragraph (1), or to avoid competitive disadvantage; and

(bb) such passthrough in any month of such crude oil cost increases is not in excess of 10 percent of the total amount of such crude oil cost increases as of the end of the calendar month in which the effective date of this paragraph occurs or any month thereafter;

(C) shall provide for the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel, and refined petroleum products at all levels of marketing and distribution; and

(D) shall not permit more than a direct proportionate distribution (by volume) to Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel), aviation fuel of a kerosene or naphtha type, and propane produced from crude oil, of any increased costs of crude oil incurred by a refiner; except that the President may, by amendment to the regulation under subsection (a) of this section or by order, permit deviation from such proportionate distribution of costs, if the President finds that refinery operations justify such deviation and further finds that to permit such deviation is consistent with the attainment of the objectives in paragraph (1) and would not result in inequitable prices for any class of users of such product.

As used in this paragraph, the term "effective date of this paragraph" means the effective date specified in section 402(b) of the Energy Policy and Conservation Act.

(3) The President in promulgating the regulation under subsection (a) of this section shall give consideration to allo-

cating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is obtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

Pro rata reductions; Presidential reports to Congress; allocation adjustments; LPG allocations

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d) of this section, the mandatory allocation program established under the regulation under subsection (a) of this section shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide —

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of each product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in —

(i) the aggregate share of nonbranded independent marketers.

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products.

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a) of this section.

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) of this section as may reasonably by necessary (A) to accomplish the objectives of subsection (b) of this section, or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) of this section as he determines may reasonably be necessary —

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent markets and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsection (b) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsection (b) of this section, the mandatory allocation program established under the regulation under subsection (a) of this section shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

Gasoline allocations; Presidential report to Congress

(d)(1) The provisions of the regulation under subsection (a) of this section respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If —

(A) an order or regulation under section 203(a)(3) of the Economic Stabilization Act of 1970 applies to crude oil,

residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after November 27, 1973, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) of this section relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) to the mandatory allocation program required under this chapter,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

Entitlements

(e) Any provision of the regulation under subsection (a) of this section —

(1) which requires the purchase of entitlements, or the payment of money through any other similar cash transfer arrangement, the purpose of which is to reduce disparities in the crude oil acquisition costs of domestic refiners, and

(2) which is based upon the number of barrels of crude oil input, or receipts, or both, of any refiner,

shall not apply to the first 50,000 barrels per day of input, or receipts, or both, of any refiner whose total refining capacity (including the refining capacity of any person who controls, is controlled by, or is under common control with such refiner) did not exceed on January 1, 1975, and does not thereafter exceed 100,000 barrels per day. The preceding sentence shall not affect any provisions of the regulation under

subsection (a) of this section with respect to the receipt by any small refiner as defined in section 752(4) of this title of payments for entitlements or any other similar cash transfer arrangement.

Pub.L. 93-159, § 4, Nov. 27, 1973, 87 Stat. 629; Pub.L. 93-511, Dec. 5, 1974, 88 Stat. 1608; Pub.L. 94-99, § 2, Sept. 29, 1975, 89 Stat. 481; Pub.L. 94-133, § 1, Nov. 14, 1975, 89 Stat. 694; Pub.L. 94-163, Title IV, §§ 401(b)(1)-(3), 402(a), 403(a), 451, Dec. 22, 1975, 89 Stat. 946, 948.

§ 754. Administration and enforcement; delegation of authority; civil and criminal penalties

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this chapter, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this chapter.

(3)(A) Whoever violates any provision of the regulation under section 753(a) of this title, or any order under this chapter shall be subject to a civil penalty —

(i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation; and

(iii) with respect to activities —

(I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or

(II) activities not referred to in clause (i) or (ii) of subclause (I) of this clause, of not more than $2,500 for each violation.

(B) Whoever willfully violates any provision of such regulation, or any such order shall be imprisoned not more than 1 year, or —

(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;

(iii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product at the retail level or any other person shall be fined not more than $10,000 for each violation;

or both.

(4) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President.

(b) The President may delegate all or any portion of the authority granted to him under this chapter to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

Pub.L. 93-159, § 5, Nov. 27, 1973, 87 Stat. 633; Pub.L. 94-163, Title IV, § 452, Dec. 22, 1975, 89 Stat. 948.

§ 755. Impact on other laws

Actions under Economic Stabilization Act of 1970

(a) All action duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Economic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 753(a) of this title, shall continue in effect until modified pursuant to this chapter.

Preemption of State or local allocation regulations and orders

(b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

Defenses

(c) There shall be available as a defense to any action brought for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this chapter or with the regulation or any order under this chapter.

Pub.L. 93-159, § 6, Nov. 27, 1973, 87 Stat. 633; Pub.L. 94-163, Title IV, § 453, Dec. 22, 1975, 89 Stat. 949.

§ 756. Monitoring of program by Federal Trade Commission

(a) During the forty-five day period beginning on the effective date on which the regulation under section 753 of this title first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President and to the Congress respecting the effectiveness of this chapter and actions taken pursuant thereto.

(b) For purposes of carrying out this section, the Federal Trade Commission's authority, under sections 46, 49, and 50 of this title to gather and compile information and to require furnishing of information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts are defined in section 44 of this title).

Pub.L. 93-159, § 7, Nov. 27, 1973, 87 Stat. 635.

§ 757. Oil pricing policy

Presidential authority to promulgate amendment to regulation establishing ceiling prices applicable to any first sale of crude oil produced in United States; resulting maximum weighted average first sale price

(a) Not later than the first day of the second full calendar month following December 22, 1975, the President shall promulgate and make effective an amendment to the regulation under section 753(a) of this title which regulation, as amended, shall establish ceiling prices (or the manner of determining ceiling prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month and each of the 39 months thereafter shall not exceed a maximum of $7.66 per barrel (hereinafter in this section referred to as the "maximum weighted average first sale price"), except as may be adjusted pursuant to this section.

Standards used in determining prices and classifications in Presidential amendment to regulation establishing ceiling prices; increase in price for any volume of old crude oil production; definition of old crude oil production

(b)(1) The regulation under section 753(a) of this title, as amended pursuant to subsection (a) of this section or by subsequent amendment thereto, may, subject to the limitations related to the maximum weighted average first sale price and other requirements of this section, provide for different ceiling prices (or manner of determining ceiling prices) for different classifications of crude oil produced in the United States. In providing for different ceiling prices (or the manner for determining such ceiling prices) and classifications for such crude oil, the President shall determine that such ceiling prices (or the manner for determining such ceiling prices) and such classifications —

(A) are administratively feasible; and

(B) are justified on the basis that such prices and such classifications are consistent with obtaining optimum production of crude oil in the United States.

(2) No amendment to the regulation under section 753(a) of this title made after December 22, 1975, may permit, in any month which begins after such date, an increase in the price for any volume of old crude oil production from any priorities, unless the President finds that such amendment —

(A) will give positive incentives for (i) enhanced recovery techniques, or (ii) deep horizon development, from such properties; or

(B) is necessary to take into account declining production from such properties; and

(C) is likely to result n a level of production from such properties beyond that which would otherwise occur if no such amendment were made.

(3) As used in paragraph (2), the term "old crude oil production" means that volume of crude oil produced and sold from a property in a month which is equal to or less than the volume of old crude oil, as defined in section 212.72 of title 10, Code of Federal Regulations (as in effect on November 1, 1975), produced and sold from such property in the months of September, October, and November of 1975, divided by 3.

Periodic Presidential determination regarding actual weighted average first sale price for crude oil; adjustments in maximum weighted average first sale price by Presidential amendment to regulation

(c)(1) Not later than 6 months after the effective date of the amendment promulgated under subsection (a) of this section, and not later than every 6 months thereafter, the Presi-

dent shall, on the basis of valid and reliable information (which may include information obtained by a valid and reliable sampling technique) of actual first sale prices of domestic crude oil, determine whether and the extent to which the actual weighted average first sale price for crude oil produced in the United States during any 6-month period or portion thereof for which data are available following the effective date of the amendment promulgated under subsection (a) of this section, exceeded or was less than the maximum weighted average first sale price of such crude oil specified in subsection (a) of this section as may be adjusted pursuant to this section.

(2) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 753(a) of this title, as amended, resulted in an actual weighted average first sale price in excess of the maximum weighted average first sale price specified in subsection (a) of this section as adjusted pursuant to this section, he shall amend the regulation to make such compensating adjustments as are necessary to result, in a corresponding period, in an actual weighted average first sale price for domestic crude oil sufficient to offset such excess.

(3) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 753(a) of this title, as amended, resulted in an actual weighted average first sale price less than the maximum weighted average first sale price specified in subsection (a) of this section as adjusted pursuant to this section, he may notwithstanding the requirements of this section pertaining to such maximum weighted average first sale price, amend the regulation to make such compensating adjustments in the regulation as are necessary to offset the deficiency in a corresponding period.

Effective date and considerations of adjusted GNP deflator and production incentive in determining adjustments in maximum weighted average first sale price by Presidential amendment to regulation; definition of adjusted GNP deflator; prerequisite for applicability of production incentive in adjustment

(d)(1) The amendment promulgated pursuant to subsection (a) of this section (or any subsequent amendment to the regulation under section 753(a) of this title) may provide for an adjustment to the maximum weighted average first sale price specified in subsection (a) of this section, such adjustment to begin no earlier than in the calendar month following the first month the amendment is in effect —

(A) to take into account the impact of inflation as measured by the adjusted GNP deflator; and

(B) as a production incentive;

except that any adjustment as a production incentive shall not permit an increase in the maximum weighted average first sale price in excess of 3 per centum per annum (compounded annually), unless modified pursuant to this section, and the combined effect of any such adjustments referred to in subparagraphs (A) and (B) shall not result in an increase in the maximum weighted average first sale price in excess of 10 per centum per annum (compounded annually), unless modified pursuant to this section.

(2) As used in this subsection, the term "adjusted GNP deflator" means the first revision of the quarterly percent change, seasonally adjusted at annual rates, of the most recent implicit price deflator for the gross national product which shall be computed and published for each calendar quarter by the Department of Commerce, subject to such additional modifications as the President shall make to exclude therefrom any amount which he determines is attributable solely and directly to increases which occur after December 22, 1975, in prices of imported crude oil, residual

fuel oil, or any refined petroleum product resulting from concerted action of two or more petroleum exporting countries.

(3) The adjustment as a production incentive referred to in paragraph (1)(B) may be made only on a finding by the President that such an adjustment is likely to provide incentive for —

(A) the discovery or development of high cost and high risk properties (including new wildcat properties, and properties located on the Outer Continental Shelf, properties located north of the Arctic Circle, deep wells and deep horizons in onshore or offshore properties, and properties operated by independent producers);

(B) the application of enhanced recovery techniques to producing properties to obtain a level of production higher than would otherwise occur from those properties but for such adjustment; or

(C) sustaining production from marginal wells, including production from stripper wells.

Submission to Congress of Presidential amendment to regulation; contents; finding to accompany additional adjustment in excess of allowable maximum; Congressional disapproval of amendment

(e)(1) Not earlier than 90 days after the effective date of the amendment promulgated under subsection (a) of this section and not earlier than 90 days after the date of any previous submission under this subsection, the President may submit to the Congress, in accordance with the procedures specified in section 6421 of Title 42, an amendment to the regulation promulgated under section 753(a) of this title which provides for (A) a production incentive adjustment to the maximum weighted average first sale price in excess of the 3 per centum limitation specified in subsection (d)(1) of this section, (B) a combined adjustment limitation in excess of the 10 per centum limitation specified in such subsection, or (C) both.

(2) Any such amendment shall be accompanied by a finding that an additional adjustment as a production incentive, or a combined adjustment limitation greater than permitted by subsection (d)(1) of this section, or both, is necessary to provide a more adequate incentive with respect to the matters referred to in subparagraphs (A), (B), or (C) of subsection (d)(3) of this section.

(3) Any such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 6421 of Title 42.

Presidential report to Congress on impact of amendment to economy and supplies; submission of amendment to Congress by President; contents; Congressional disapproval of amendment; submission of additional amendment upon disapproval; effect of no amendment to continue or modify adjustment as production incentive

(f)(1) On February 15, 1977, the President shall submit to the Congress a report containing an analysis of the impact of any amendment adopted pursuant to this section on the economy and on the supply of crude oil, residual fuel oil, and refined petroleum products.

(2) The President may submit with such report to the Congress, in accordance with the procedures specified in section 6421 of Title 42, an amendment to the regulation promulgated under section 753(a) of this title which —

(A) provides for the continuation or modification of the adjustment as a production incentive (referred to in subsection (d) of this section as may have been amended pursuant to subsection (e) of this section);

(B) provides for a modification of the combined adjustment limitation (referred to in subsection (d) of this section, as may have been amended pursuant to subsection (e) of this section);

(C) provides for adjustments with respect to both subparagraphs (A) and (B).

(3) Such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 6421 of Title 42.

(4) If any such amendment is disapproved by either House of Congress, the President may not later than 30 days after the date of such disapproval, submit one additional amendment in accordance with paragraph (2), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 6421 of Title 42.

(5) If no amendment to continue or modify the adjustment as a production incentive takes effect, no such adjustment to the maximum weighted average first sale price thereafter may be taken into account in computing such price for any month which begins after (A) the date on which a submission could have been made under paragraph (2) but was not, or (B) the last date on which a submission was disapproved and no further submission pursuant to paragraph (4) could be made, except that the President may, pursuant to the procedures under subsection (e) of this section, submit an amendment to the regulation to provide for a prospective reinstatement of such adjustment or of a modification of such adjustment.

Presidential report to Congress on regulation in effect April 15, 1977; submission of amendment to Congress by President; criteria, time and contents of amendment; findings and data; Congressional disapproval of amendment; submission of additional amendment upon disapproval; limitations on further amendment of approved amendment

(g)(1) On April 15, 1977, the President shall submit to the Congress a report as to whether the regulation promulgated under section 753(a) of this title and in effect on such date will provide positive price incentives for the development of

the domestic crude oil production referred to in paragraph (2)(A) without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States.

(2) If the President determines that a price required to provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2)(A) would, because of the maximum weighted average first sale price specified in subsection (a) of this section, as adjusted, have the effect of reducing or limiting ceiling prices permited for crude oil produced in the remainder of the United States to levels which would result in less production of such crude oil than would otherwise occur, the President may, together with such report, or at any time thereafter not earlier than 90 days after any previous submission under this subsection, except as provided in paragraph (4), submit to the Congress in accordance with the procedures specified in section 6421 of Title 42 an amendment to the regulation promulgated under section 753(a) of this title which —

(A) excludes up to 2 million barrels a day of crude oil production transported through the trans-Alaska pipeline from the computation of the maximum weighted average first sale price specified in subsection (a) of this section; and

(B) establishes ceiling prices (or a manner of determining prices) for the first sale of crude oil production referred to in subparagraph (A) such that the actual weighted average first sale price for such production will not exceed the highest actual weighted average first sale price permitted under the regulation for significant volumes of any other classification of domestic crude oil.

(3) Any such amendment shall be accompanied by such findings and supporting rationale as the President determines justify such ceiling prices (or manner for determining such prices). Any amendment submited to the Congress pursuant

to this subsection shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 6421 of Title 42.

(4) If any such amendment is disapproved by either House of Congress, the President may not later than 30 days after the date of such disapproval submit one additional amendment in accordance wth paragraphs (2) and (3), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 6421 of Title 42.

(5) If any amendment submitted by the President to the Congress pursuant to this subsection becomes effective, such amendment may thereafter be further amended by the President, subject to the procedures and requirements of paragraphs (2) and (3) of this subsection, except that no such further amendment shall be submitted earlier than January 1, 1978, and thereafter no earlier than 90 days after the date of any previous submission made under this paragraph.

Limitations on judicial review of amendment

(h) In any judicial review of an amendment required by this section to be submitted to the Congress in accordance with the procedures specified in section 6421 of Title 42, the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of this section or of subparagraph (A), (E), or (F) of section 706(2) of title 5.

Pub.L. 93-159, § 8, as added Pub.L. 94-163, Title IV, § 401(a), Dec. 22, 1975, 89 Stat. 941.

§ 758. Passthroughs of cost price decreases; effective date

Not later than the first day of the second full calendar month following December 22, 1975, the regulation under

section 753(a) of this title shall provide for a dollar-for-dollar passthrough in prices at all levels of distribution from the producer through the retail level of decreases in the costs of crude oil, residual fuel oil, and refined petroleum products (including decreases in costs which result from a reduction in the price of crude oil produced in the United States because of the amendment to such regulation required under section 757(a) of this title).

Pub.L. 93-159, § 9, as added Pub.L. 94-163, Title IV, § 401(a), Dec. 22, 1975, 89 Stat. 946.

§ 759. Limitations on pricing authority of President

The President shall have no authority, under this chapter, or under the Energy Policy and Conservation Act, to prescribe minimum prices for crude oil (or any classification thereof), residual fuel oil, or any refined petroleum product.

Pub.L. 93-159, § 10, as added Pub.L. 94-163, Title IV, § 402(c), Dec. 22, 1975, 89 Stat. 947.

§ 760. Reevaluation of regulation; criteria; notice and hearing; transcript; Presidential report to Congress and promulgation of amendments to regulation

(a) Not later than 60 days after December 22, 1975, the President shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views, and arguments respecting the appropriateness of, or the continuing need for, the application of any provision of the regulation promulgated under section 753(a) of this title as such provision relates to the attainment of the objectives specified in section 753(b)(1) of this title. A transcript shall be kept of any such oral presentations of data, views, and argument.

(b) The President shall, after consideration of such written and oral presentations and such other information as may be available to him —

(1) analyze such presentations and report thereon to the Congress within 120 days after December 22, 1975; and

(2) shall promulgate, pursuant to the limitations and authority under section 760a of this title, such amendment, or amendments, to the regulation promulgated under section 753(a) of this title as he determines are necessary or appropriate —

(A) to modify any provisions of such regulation in a manner which is consistent with the attainment, to the maximum extent practicable, of objectives specified in section 753(b)(1) of this title; or

(B) to eliminate any provisions of such regulation no longer necessary to provide for the attainment of such objectives.

Pub.L. 93-159, § 11, as added Pub.L. 94-163, Title IV, § 454, Dec. 22, 1975, 89 Stat. 950.

§ 760a. Conversion mechanism to standby authorities

Limitations on Presidential amendments to regulation

(a) The President may not amend the regulation under section 753(a) of this title in any manner which —

(1) exempts crude oil produced in the United States from any provision of such regulation required to be made a part of such regulation by section 757 of this title; or

(2) results in making such regulation, as so amended, inconsistent with any limitation or other requirement specified in section 757 of this title.

Criteria for Presidential amendment to regulation

(b) Except as provided in subsection (a) of this section, the President may amend the regulation under section 753(a) of this title if he determines that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives.

Prerequisites for promulgation of amendment to regulation authorizing exemptions from regulation; procedures; definition of refined product category; Congressional approval of amendment

(c)(1) Any such amendment which, with respect to a class of persons or class of transactions (including transactions with respect to any market level), exempts crude oil, residual fuel oil, or any refined petroleum product or refined product category from the provisions of the regulation under section 753(a) of this title as such provisions pertain to either (A) the allocation of amounts of any such oil or product, or (B) the specification of price or the manner for determining the price of any such oil or product, or both of the matters described in subparagraphs (A) and (B), may take effect only pursuant to the provisions of this subsection.

(2) The President shall submit any amendment referred to in paragraph (1) to the Congress in accordance with the procedures specified in section 6421 of Title 42. Any such amendment shall be accompanied by a specific statement of the President's rationale for such amendment and the matter described in subsection (d) of this section. Such an amendment —

(A) may apply only to one oil or one refined product category;

(B) may apply to the matters specified in either subparagraph (A) or (B) of paragraph (1) of this subsection, or both; and

(C) may provide for scheduled or phased implementation.

(3) As used in this section the term "refined product category" means —

(A) motor gasoline;

(B) Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel);

(C) propane; or

(D) all or any portion of other refined petroleum products as a class (including natural gas liquids and natural gas liquid products, other than propane).

(4) Such an amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 6421 of Title 42.

Supporting findings and statements by President to accompany submission to Congress of amendment of regulation authorizing exemptions from regulation; contents

(d)(1) The President shall support any amendment described in subsection (b) of this section which is transmitted to the Congress under subsection (c) of this section with a finding that such amendment is consistent with the attainment of the objectives specified in section 753(b)(1) of this title and in the case of —

(A) Any exemption described in subsection (c)(1)(A) of this section, with a finding that such oil or refined product category is no longer in short supply and that exempting such oil or refined product category will not have an adverse impact on the supply of any other oil or refined petroleum product subject to this chapter; and

(B) any exemption described in subsection (c)(1)(B) of this section, with a finding that competition and market forces are adequate to protect consumers and that exempting such oil or refined product category will not result in inequitable prices for any class of users of such oil or product.

(2) Any amendment which the President submits to the Congress under subsection (c) of this section shall be accompanied —

(A) by a statement of the President's views as to the potential economic impact (if any) of such amendment which, where practicable, shall include his views as to —

(i) the State and regional impacts of such amendment (including effects on governmental units);

(ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as fuel or as feedstock for industry; and

(iii) the effects on employment and consumer prices; and

(B) in the case of an exemption described in section (c)(1)(B) of this section by an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

Limitation on judicial review of amendment

(e) In any judicial review of an amendment required by this section to be submitted to Congress in accordance with the procedures specified in section 6421 of Title 42, the reviewing

court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of subsection (c), (d), or (g) of this section or subparagraph (A), (E), or (F), of section 706(2) of Title 5.

Presidential authority to reimpose allocation and price requirements on any exempt oil or refined product category; subsequent exemptions

(f) With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specification of price or the manner for determining the price of any such oil or refined product category upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 753(b)(1) of this title. Any such oil or refined product category for which allocation or price requirements are reimposed under authority of this subsection may subsequently be exempted without regard to the provisions of subsection (c) of this section.

Exemptions for small refiners; modification of exemption by Presidential amendment of regulation; disapproval by Congress

(g) Notwithstanding the provisions of subsection (e) of section 753 of this title, the President may, if he determines that the exemption from payments for certain small refiners required by such subsection —

(1) results in unfair economic or competitive advantage with respect to other small refiners; or

(2) otherwise has the effect of seriously impairing the President's ability to provide in the regulation under section 753(a) of this title for the attainment of the objective specified in section 753(b)(1)(D) of this title and for the

attainment of those other objectives specified in section 753(b)(1) of this title;

submit, in accordance with the procedures specified in section 6421 of Title 42, an amendment to modify the regulation under section 753(a) of this title with respect to the provisions of such regulation as they relate to such exemption. Such amendment shall not take effect if disapproved by either House of Congress under the procedures specified in such section 6421 of Title 42.

Pub.L. 92-159, § 12, as added Pub.L. 94-163, Title IV, § 455, Dec. 22, 1975, 89 Stat. 950.

§ 760b. Standby purchase authority of President

Amendment to regulation to import or purchase foreign oil for resale in United States

(a) The President may, by amendment to the regulation under section 753(a) of this title, provide for and implement a procedure pursuant to which the United States may exercise the exclusive right to import and purchase all or any part of the crude oil, residual fuel oil, and refined petroleum products of foreign origin for resale in the United States.

Subsidy or preference to any importer, purchaser, or user, prohibited

(b) The authorities granted under this section shall not be used for the purpose, or with the effect, of providing a subsidy or preference to any importer, purchaser, or user.

Purchase and sale of foreign oil to be without profit or loss; exception

(c) In exercising any authorities granted under this section, the President shall endeavor to buy and sell without profit or loss, except that the President may, in individual cases, sell,

on a competitive bid basis, crude oil, residual fuel oil, or any refined petroleum product at a price above or below the cost of such oil or product if, in the judgment of the President, such sales may result in progress toward a lower price for oil sold in international commerce.

Submission of amendment to regulation to Congress for review; supporting explanation and findings by President to accompany submission; Congressional disapproval of amendment

(d) Any amendment to the regulation proposed to be implemented under this section shall be submitted to Congress for review under section 6421 of Title 42, together with a detailed explanation of the procedure to be employed and the need therefor and shall be supported by findings by the President that the exercise of such authority is likely to reduce prices for imported oils and products. Such amendment shall not take effect if disapproved by either House of the Congress in accordance with the procedures specified in section 6421 of Title 42 and any authority to purchase shall be subject to appropriations Acts.

Submission of Presidential feasibility report to Congress; contents

(e) The President shall submit, within 90 days after December 22, 1975, a report which evaluates the feasibility of reducing the price of crude oil, residual fuel oil, or refined petroleum products of foreign origin for resale in the United States by providing incentives for domestic producers who also import such oils or products into the United States, to work for the reduction of the price of such oils or products. The report shall specifically discuss whether increasing aggregate old crude oil prices by an amount related to any decrease in aggregate prices for such imported oils and products would serve as an incentive for domestic producers to reduce the price of such imported oils and products.

Pub.L. 93-159, § 13, as added Pub.L. 94-163, Title IV, § 456, Dec. 22, 1975, 89 Stat. 952.

§ 760c. Direct Presidential controls on refinery operations; procedures; criteria

The President may, by amendment to the regulation under section 753(a) of this title or by order, as may be consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title, require adjustments in the operations of any refinery in the United Sates with respect to the proportions of residual fuel oil or any refined petroleum product produced through such operations if he determines such adjustments are necessary to assure the production of residual fuel oil or any refined petroleum product in such proportions as are necessary or appropriate to provide for the attainment, to the maximum extent practicable, the objectives specified in section 753(b)(1) of this title.

Pub.L. 73-159, § 14, as added Pub.L. 94-163, Title IV, § 457, Dec. 22, 1975, 89 Stat. 953.

§ 7860d. Presidential control of domestic oil and oil product inventories

Standby authority

(a) In addition to other authority provided for in this chapter to alleviate shortages of crude oil, residual fuel oil, and refined petroleum products, the President may, if he finds an existing or impending regional or national supply shortage of any fuel, by amendment to the regulation under section 753(a) of this title or by order, consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title, require adjustments in the amounts of crude oil, residual fuel oil or any refined petroleum product which are held in inventory by persons who are engaged in the business of importing, producing, refining, marketing, or distributing such oils or products.

Exercise of authority

(b) The authority specified in subsection (a) of this section may be exercised to require either —

(1) a distribution from such inventories to specified persons or classes of persons at specified rates of distribution or to specified levels of inventory accumulation; or

(2) the accumulation of inventories at specified rates of accumulation or to specified levels,

as the President determines may be necessary or appropriate to provide for the attainment, to the maximum extent practicable, of the objectives of section 753(b)(1) of this title or as the President determines may be necessary or appropriate to carry out the obligations of the United Sates under the international energy program, as defined in section 6202 of Title 42.

Maintenance of inventories required under standby authority

(c) The authority specified in subsection (a) of this section may require the maintenance of inventories at levels greater or lesser than such person's normal business or operating requirements; except that such amounts shall not exceed the amount of oil or product, as the case may be, such person would use or distribute during any 90-day period of peak usage and in no case may the requirement to accumulate inventories be applied to any person in a manner which would necessitate such person making physical additions to storage facilities in order to comply with any such rule or order.

Pub.L. 93-159, § 15, as added Pub.L. 94-163, Title IV, § 458, Dec. 22, 1975, 89 Stat. 953.

§ 760e. Prohibition against willful accumulation of excess crude, etc., oil during severe energy supply interruption

Except as may be otherwise provided with respect to persons engaged in the business of producing, refining, distributing, or marketing crude oil, residual fuel oil, or any refined petroleum product pursuant to section 760d of this title or pursuant to requirements under section 6236 of Title 42 (relating to the Industrial Strategic Petroleum Reserve), the regulation under section 753(a) of this title shall prohibit any person, during a severe energy supply interruption (as defined in section 6202 of Title 42) from willfully accumulating crude oil, residual fuel oil, or any refined petroleum product in inventories, or otherwise, in amounts which are in excess of such person's reasonable needs (as such term shall be defined in such regulation).

Pub.L. 93-159, § 16, as added Pub.L. 94-163, Title IV, § 459, Dec. 22, 1975, 89 Stat. 954.

§ 760f. Allocation of asphalt; Presidential authority for amendment of regulation; subsequent exemption

(a) The President may amend the regulation under section 753(a) of this title to require, in a manner which he finds is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title, the allocation of asphalt in amounts specified in (or determined in the manner prescribed by), or at prices specified in (or determined in a manner prescribed by) such amendments to the regulation, or both.

(b) If the President exercises the authority under this section, he may thereafter amend the regulation under section 753(a) of this title to exempt asphalt from such regulation without regard to the provisions of section 750a of this title.

Pub.L. 93-159, § 17, as added Pub.L. 94-163, Title IV, § 460, Dec. 22, 1975, 89 Stat. 955.

§ 760g. Conversion date of Presidential authority from mandatory to discretionary to promulgate, etc., regulation; termination date of Presidential authority limitations; expiration date of Presidential authority to promulgate, etc., regulation or issue order; effect on pending actions

Notwithstanding any other provision of this chapter, at midnight on the conclusion of the 40th month in which the amendment under section 757(a) of this title is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 753(a) of this title shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 753(b)(2), 757 and 758 of this title shall terminate. The authority to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or ciminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

Pub.L. 93-159, § 18, as added Pub.L. 94-163, Title IV, § 461, Dec. 22, 1975, 89 Stat. 955.

§ 760h. Reimbursement to States for implementation of delegated responsibilities

Authorization of President

(a) The President is authorized to reimburse any State for expenses incurred by such State in carrying out any responsibilities delegated to such State by the President under the provisions of this chapter.

Source of reimbursement

(b) Such reimbursements may be paid from any funds appropriated for the purpose of carrying out responsibilities under this chapter, unless any appropriation Act specifically provides to the contrary.

Report to Congress by President; contents

(c) Not later than June 1, 1976, the President shall submit a report to the Congress analyzing and detailing the amount and nature of any reimbursements made to any State for expenses described in subsection (a) of this section incurred prior to such date and specifically recommending whether authorizations of additional funds for direct grants to States are necessary or appropriate for the continued operation of the reimbursement provisions authorized by this section.

Pub.L. 93-159, § 19, as added Pub.L. 94-163, Title IV, § 462, Dec. 22, 1975, 89 Stat. 955.

May 16, 1980

Hon. John C. Sawhill
Deputy Secretary of Energy
Forestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Sawhill:

We believe the Department of Energy should be concerned with the State of Connecticut's recent enactment of a so-called "gross earnings" tax levied upon the sale of petroleum products by refiners in that state. Both the legislative hearings during which this tax was considered and the final form of the tax itself suggest that Connecticut is attempting to take advantage of DOE regulations and rulings to transfer the burden of a tax based upon Connecticut consumption to out-of-state consumers.

Our concern is further amplified by the fact that other states such as New York, Rhode Island, etc., are considering similar tax proposals.

The Connecticut law provides as follows:

> "Any petroleum company which is engaged primarily in the refining and distribution of petroleum products and distributes such products to wholesale and retail dealers for marketing and distribution in this state shall pay a quarterly tax at the rate of two percent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products in this state."

Taking advantage of the "equal application" rule (10 C.F.R. 212.83[h]) and the DOE's decision in *State of Oregon* (2 FEA Section 80.616 [1975]), Connecticut also included the following provision with the intent of preventing refiners from passing the tax on gasoline sales entirely through to their Connecticut customers:

> "It is not the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies."

To prevent the pass through of the tax on the sale of so-called "exempt" petroleum products, the Connecticut law provides:

> "No petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by

> an amount higher than the average amount by which such company raises its wholesale rack price for such product in all ports on the eastern coast of the United States."

While state taxation may not generally be of concern to the DOE, we believe action on your part is warranted where a state has so blatantly attempted to use and take advantage of DOE regulations and rulings to transfer to non-Connecticut consumers the burden of Connecticut taxes.

Notwithstanding Connecticut's attempt to disguise the true nature of this tax, it is in effect a wholesale sales tax similar to a percentage motor fuel excise tax. We believe DOE should take the position that this tax is a cost uniquely associated with the sale of petroleum products in Connecticut, allowing it to be added to our prices in Connecticut as a sales tax. In the alternative, DOE could act favorably upon requests for exception relief from the equal application rule.

As to Section 13(b) of the Connecticut law dealing with decontrolled products, we believe their attempt to regulate the price of these products is clearly preempted by the Emergency Petroleum Allocation Act. The fact that the price of these products is not controlled at this time does not mean they are not subject to control. In fact, the decision by DOE to remove controls from certain products places Connecticut's action in direct conflict with federal law and policy.

Because the Connecticut tax could serve as a precedent to other states, we believe it is important for DOE to take a position on the concerns expressed in this letter.

I would appreciate a meeting with you to discuss these concerns further.

Very truly yours,

Robert G. Weeks

Mr. Robert Weeks
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

Dear Mr. Weeks:

This is in response to your letter to the Deputy Secretary regarding the State of Connecticut's "gross earnings" tax.

You are correct that generally this Department does not become involved in matters of State taxation of petroleum products.

Any attempt by a State in structuring its tax to capitalize upon a particular regulatory provision in our price regulations is not likely to be ultimately successful. Not only will all the price regulations expire by October 1981, but also the life of any particular regulatory provision may well be shorter. Indeed, the Economic Regulatory Administration has just proposed elimination of the equal application rule, which would eliminate the proscription against oil companies passing allowable tax costs through where they are incurred.

We do not agree with your contention that Section 13(b) of the Connecticut law is preempted by the Emergency Petroleum Allocation Act (EPAA). By its terms that section only applies to petroleum products "exempt" from the EPAA, which we take to mean currently decontrolled under that Act. We do not read the EPAA as preempting the entire field of price and allocation regulation of crude oil and petroleum products. Rather the Federal regulations supersede State law only where there is a legal conflict between them.

Sincerely,

Lynn R. Coleman
General Counsel

APPENDIX F

BANKS AND BANKING, 12 U.S.C. 1904, note

§ 211 of Economic Stabilization Act of 1970

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

"(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Judge of the Supreme Court of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d) (2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the

effectiveness of any regulation or order issued thereunder. In all other respects the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgement by the district court.

"(c) In any action commenced under this title in any district court of the United State in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d) (1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2) of Title 5], and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of

the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code [section 1292(b) of Title 28]; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e) (1) Except as provided in subsection (d) of this section, no interlocutory enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United State Code [section 706(2) of Title 5], or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emer-

gency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgement shall be postponed until an order of the Supreme Court denying such petition become final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgement or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United State Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of

enactment, in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

APPENDIX G

U.S.C. 28 § 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

June 25, 1948, c. 646, 62 Stat. 932.

MAY 29 198
ALEXAND. R L. STI
K

No. 80-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners,*

v.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents.*

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners,*

v.

TEXACO INC., *Respondent.*

ELLA T. GRASSO, Govenor of the State of Connecticut, et al., *Petitioners,*

v.

AMERADA HESS CORPORATION, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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APPENDIX TO JOINT BRIEF IN OPPOSITION

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

LIST PURSUANT TO RULE 28.1

MOBIL OIL CORPORATION

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian Petroleum Supply Company (S.A.), The
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Associated Octel Company, Limited, The
ATAS — Anadolu Tasfiyehanesi Anomin Sirketi
Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bayerische Mineral-Industria A.G.
Belix
Belridge Oil Company

Benoil S.A.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Services S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chicago Rotoprint Company
Colombianos Distribuidores de Combustibles, S.A.
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Comex-Seal Limited
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Campagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise de Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Companis Mexicana de Especialidades Industriales, S.A. de C.V.

Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company

CORCOP

Corrugadora de Carton, S.A.
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Transalpine Oelleitung GmbH
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Legergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Faavang Autoverksted A/S

FACEL

Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Frome-Broken Hill Company Proprietary Limited
Fuso Operations Kabushiki Kaisha

Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Gesellschaft fur Umweltschutz und Beseitigung von 01-und chemischen Abfallen Gesellschaft mbH
Ghana Bunkering Services Limited
G.I.E. des Societes Mobil de l'Afrique de L'Quest
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Inc.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hotell och Restaurant AB Mobilen Kommanditbolag
Hotell och Restaurant Aktiebolaget Mobilen
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Island Exploration Company Proprietary Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
Kanto Oil Pipeline Co., Ltd.
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Kobe Port Service Kabushiki Kaisha
Kosmogas (Hellas) Industrial and Commercial Company S.A.
Kygnus Ekika Gas Kabushike Kaisha
Kygnus Sekiyu Kabushiki Kaisha

Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Supermarches De Cote D'Ivoire
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Michael Beecham Limited
Mobil Ami, S.A.
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil-Comercio, Industria e Servicos Ltda.
Mobil Exploration Gabon Inc.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries
Mobil Motor Rest AG
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil (Switzerland)
Mobil Oil Tchad
Mobil Oil Togo
Mobil Oil Turk Anonim Sirketi

Mobilrex
Mobil Tyco Solar Energy Corporation
Molinos de Carton y Papel, S.A.
M.O.R.E.M.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
Nichimo Sekiyu Seisei Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
Occidental de Empaques, Ltda.
Octel Assoiates
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe L-ne Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Pars Investment Corporation
Petrocab
Petrogas Processing Ltd
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.
Qatar Petroleum Company Limited
Qualbank, Inc.
Ragosine Oil Company Limited
Rainbow Pipe Line Company, Ltd.

Randhurst Corporation
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Roc Lubricants Limited
Rohoel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S.A. Mas & Cie
Sanwa Kasei Kogyo Kabushike Kaisha
Sarni S.p.A.
Saudi Can Company, Ltd., The
Saudi Maritime Company Ltd.
Schubert Kommanditgesellschaft
S.C.I. Du fonds Du Val
Seal Participants (Holdings) Limited
Segher de Mexico, S.A. de C.V.

SENERCO

Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Camerounaise d'Entreposage (S.C.E.)
Societe Camerounaise de Depots Petroliers (S.C.D.P.)
Societe Civile de Mustapha
Societe Civile d'Etudes de l'Alimentation en Eau de la Region Industrielle de Port Jerome
Societe Civile Immobiliere Courcelles-Etoile
Societe Civil Immobiliere de Construction du 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civil Immobiliere de Construction "La Residence Brune"

Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Enterprises (Meple)
Societe de Renovation D'Emballages Metalliques (Rem)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe de Renovation d'Emballages Metalliques
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Etablissements Goux
Societe des Etablissements Goux
Societe Des Huiles Lemahieu
Societe du Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Bagonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)

Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
Sonarep (South Africa) (Proprietary) Limited

SONEX

South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Toulouse-Distribution Produits Petroliers
T. R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Twifo Oil Plantations Ltd.
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
VOSACEC, S.P.A.
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Western Petroleum Products Limited
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

AMOCO OIL COMPANY

Analog Devices
Chicago Bank of Commerce
Cetus Corporation
Dearborn Park Corporation
Illinois Neighborhood Development Corporation
Solarex Corporation
Semix
Alberta Gas Trunk Line Company, Limited
Alberta Underground Storage, Limited
L.C.P. Operations, Limited
Pembalta Gas System No. 1, Limited
Pembalta Gas System No. 2, Limited
Pembalta Gas System No. 3, Limited
Pembalta Gas System No. 4, Limited
Pembalta Gas System No. 5, Limited
Pembalta Gas System No. 6, Limited
Pembalta Gas System No. 7, Limited
Pembalta Gas System No. 8, Limited
A/S Penkem
Amoco Fina, S.A.
China American Petrochemical Company, Limited
Rhodiaco Industrias Quimicas, Limitada
Samsung Petrochemical Company, Limited
Tereftalatos Mexicanos, S.A.
A.G. International Chemical Company, Inc.
Amoshore Drilling Company
Far East Bulk Carriers, Inc.
Intercontinental Quimica, S.A.
Singapore Petroleum Company Pte., Limited
Singapore Refining Co. Pte. Ltd.
Societa Oleodotto Tavazzano Trecate, S.p.A.
Mainline Pipeline, Limited
Cliffe Storage, Limited
Kharg Chemical Company, Limited
Mittelland Raffinerie, A.G. (The)
Petroleum Storage, Limited

Petrolera Curaray, S.A.
Gulf of Suez Petroleum Company
Rudeis Oil Company
Torsina Oil Company
Amoco Australia, Limited
Madras Fertilizers, Limited
Madras Refineries, Limited
Iran Pan American Oil Company
Stratford Transportation
AIMSA S.A. de C.V.
Amoco Exploration Ziare, S.P.R.L.
Fertilizers of Trinidad and Tobago, Limited
Ocean Minerals Company
Cymoly Corporation
Cyprus Anvil Mining Corporation Ltd.
Pelly River Mines, Limited (N.P.L.)
Cyrpus Metallurgical Processes Corporation
Cyprus Pima Mining Company
General Electric Company
Salmon River Scheelite Corporation
Madison Minerals, Inc.
Mount Wheeler Mines, Limited
Nihon Mistron Company, Limited
Rome Group, Incorporated
Sierra Talc De Mexico, S.A.
Sierra Monterey, S.A.
White Pigment Corporation
Minera Cuicuilco, S.A. de C.V.
Rio Blanco Oil Shale Company
ACM Services, Incorporated
Atlas Supply Company
Farmers Fertilizer Company
Chicap Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
West Shore Pipe Line Company
Wyco Pipe Line Company
Abbott Pipe and Supply

FM-4 Gila River Corporation
Indecorp, Inc.
Redman Pipe and Supply Company
Canyon Reef Carriers, Incorporated
East Texas Salt Water Disposal Company
Gravcap, Incorporated
Sultran, Limited

GETTY REFINING AND MARKETING CO.

Getty Oil Company

GULF OIL CORPORATION

A/S Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Albert Rose Chemicals, Ltd.
Allied-General Nuclear Services
Andogas, S.A.
Asia Polymer Corporation
Autobahn-Raststaette Wuerenlos Ag.
Aviation Fueling Services
Bio Research Center Company, Limited
Britama Tankers Limited
Burgan Pension Fund Trustees Limited
China Gulf Oil Company Limited
China Gulf Plastics Corporation
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company
Compagnie D'Investissement Bustibles de Reacteurs a Haute Tp.
"Condor" Industria Quimica, S.A.
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Eastern Venezuela Gas Transport Company
Ethyleen Pijpleiding Maatschappij (Belgium) S.A.
Ethyleen Pijpleiding Maatschappij (Nederland) B.V.

Explorer Pipeline Company
General Atomic Company
Gulf Canada Limited
Gulf Canada Products Limited
Gulf Canada Resources, Inc.
Gulf Oil Zaire S.A.R.L.
Harshaw-Murata Kabushika Kaisha
Harshaw-Juarez S.A. de C.V.
Harshaw Galvanotecnia S.A.
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GMBH
Industrias Vencedor S.A.
Interquimica S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Kuwait Oil Company Trustees Limited
Laurel Pipe Line Company
London Oil Refining Company Limited
Mainline Pipelines Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
Mozambique Gulf Oil Company
Oil Shippers Services, Inc.
Oklahoma Nitrogen Company
Paloma Pipeline Company
Pembroke Capital Company
Pembroke Cracking Company
Petrosil Oil Company Limited
Plastigama, S.A.
Platte Pipe Line Company
Pol Transport AB
Polyquimicos, S.A.
Raffinerie De Cressier S.A.
Resinas Andinas S.A.
Rio Blanco Oil Shale Partnership
SARNI S.p.A.

Societe de Combustible Pour Reacteurs a Haute Temperature (Corhat)
Solvent Refined Coal International, Inc.
Sunrise International Company, Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Taita Chemical Company, Ltd.
Taiwan Plasticizer Corporation
Taiwan VCM Industries Corp.
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

SUN OIL COMPANY OF PENNSYLVANIA

SUN COMPANY INC.

SUNCOR INC.

Albersun Pipeline Ltd.
Alberta Gas Trunk Line Company Ltd.
Apet Products Pipe Line Limited
Athabasca Realty Company Limited
Baron Petroleums Inc.
Carnduff Gas Limited
Gow Fuels Inc.
Maywelle Properties Ltd.
Nottingham Gas Limited
Ouimet-Gobeille Inc.
  Pembalta Gas System No. 3 Ltd.
  Pembalta Gas System No. 4 Ltd.
Redwater Water Disposal Company Limited
SMS Petroleums Ltd.
Sultran Ltd.
Sun-Canadian Pipe Line Company Limited
Sun Explorations Of Quebec Ltd.
Sun Oil Company Of Canada Limited
Suncor Supply Limited
Sunoco Home Comfort Inc.
  Muskoka Oil Company Limited

Sunoco Inc.
Chemsun Inc.
Solartech Limited
Sunchem Inc.
Sunchem Shipping Inc.

SUNRAY DX CANADA OIL COMPANY

SUN OIL COMPANY (DELAWARE)

SUN GAS COMPANY, A DIVISION

Planters Fertilizer Company, Inc.
Sun Gas Liquids, Inc.
Sun Gas Terminals And Storage, Inc.
Sun Gas Terminals And Storage (Pa.), Inc.
Sun Gas Transmission Company, Inc.
Sun Nitrogen Products, Inc.

SUN PRODUCTION COMPANY, A DIVISION

Canyon Reef Carriers, Inc.
East Texas Salt Water Disposal Company
Jaresa Gas Gathering Company
Radep Pipeline Company
Sunoco Operations, Inc.
Van Salt Water Disposal Company

SUN TEXAS COMPANY, A DIVISION

SUNMARK EXPLORATION COMPANY, A DIVISION

Angola Sun Oil Company
Arabian Sun Oil Company
Argentine Sun Oil Company
Australian Sun Oil Company, Ltd.
Bolivian Sun Oil Company
Burma Sun Oil Company
Deutsche Sun Oil Company
Dubai Sun Oil Company
Ecuador Sun Oil Company
French Sun Oil Company
Hispanic Sun Oil Company
Indonesia Sun Oil Company

Iranian Sun Oil Company
  Lavan Petroleum Company
Irish Sun Oil Company
Kenya Sun Oil Company
Libyan Sun Oil Company
Mali Sun Oil Company
Maroc Sun Oil Company
Mediterranean Sun Oil Company, S.p.A.
Niger Sun Oil Company
Noordzee Sun Oil Company
Norsk Sun Oil Company
  Scandinavian Sun Oil Company A/S
North Sea Sun Oil Company, Ltd.
Oman Sun Oil Company
Pakistan Sun Oil Company
Peruvian Sun Oil Company
Philippine Sun Oil Company
Portugal Sun Oil Company
Solgas, Inc.
Sun Eastern Exploration Company
Sun Exploration And Production Company Of Pennsylvania, Inc.
Sun Oil Algerie Inc.
Sun Oil Company (U.K.) Ltd.
  Viking Oil Limited
Sun Oil International, Inc.
  Liberian International American
Sun Orient Exploration Company
Sun Overseas Services, Inc.
Sun Support Services, Inc.
  Sun Support Venezuela, Inc.
Sunmark Indonesia, Inc.
Sunmark Overseas Petroleum, Inc.
Sunmark Worldwide Services, Inc.
Sunray Australian Oil Company, Inc.
Sunray Borneo Oil Company, Inc.
Sunray Colombia Oil Company
Sunray Iranian Oil Company, Inc.

Sunray Nigeria, Inc.
  Sunray Nigeria Oil Company Unlimited
Sunray Venezuela Oil Company, Inc.
  Venezoil C.A.
Thailand Sun Oil Company
Venezuelan Sun Oil Company
Vietnam Sun Oil Company

SUN SHIP, INC.

El Taino Operations, Inc.
GTS Venture Corporation
  Sunexport
660 Leasing Company
663 Leasing Company
Sound Shipping, Inc.
TTT, Inc.

MARINE INVESTMENT COMPANY OF DELAWARE

Alaska Bulk Carriers, Inc.
Delaware Sun Shipping, Inc.
Delaware Valley Marine Agency and Repair, Inc.
Eastern Sun Shipping, Inc.
Florida Barge Company
Glacier Bay Transportation Company
Millcreek Leasing Corporation
New Jersey Sun Shipping, Inc.
New York Sun Shipping Co., Inc.
Northern Sun Shipping Co., Inc.
  Atlantic Sun Shipping Company, Inc.
  Balboa Sun Shipping Company, Inc.
  Mediterranean Sun Shipping Company, Inc.
    Sarnia Shipping Company, Inc.
    Welland Shipping Company, Inc.
Pennsylvania Sun Shipping, Inc.
Philadelphia Sun Shipping Co., Inc.
Sun Barge Company
Sun Transport, Inc.
Texas Sun Shipping, Inc.

Virginia Sun Shipping Co., Inc.
Western Sun Shipping, Inc.

SUN CARRIERS, INC.

Carolina Consolidators, Inc.
Carrier Systems, Inc.
  CSI Six, Inc.
  CSI Seven, Inc.
  CSI Eight, Inc.
  CSI Nine, Inc.
  CSI Ten, Inc.
Carrier Systems International Motor Freight, Inc.
Jones Truck Lines, Inc.
  CSI Two, Inc.
Milne Truck Lines, Inc.

SUN CARRIERS, INC.

S.J.T., Inc.
  SJT Real Estate Holding Co., Inc.
    SJT-Cambridge Realty Corp.
    SJT-Maspeth Realty Corp.
  St. Johnsbury Trucking Company, Inc.
    Zelco, Inc.
Standard Trucking Company

SUN PIPE LINE COMPANY

Sun Pipe Line Company Of Delaware
  Explorer Pipeline Company
  Inland Corporation
  Mid-Continent Pipe Line Company
  Mid-Valley Pipeline Company
  Sun Oil Line Company Of Michigan
  Sun Pipe Line Services Co.
  Texoma Pipe Line Company
  West Texas Gulf Pipe Line Company

SUN TERMINALS, INC.

Gulf Coast Marine Agents, Inc.
Gulf Coast Marine Fueling, Inc.

Lou Petroleum Company
Lou Towing Company
STI Investments, Inc.
Sun Terminals, Inc. Of Louisiana
Sun Terminals, Inc. Of New Jersey
Sunoco Terminals, Inc. (DE)
Sunoco Terminals Of Baltimore, Inc.

SUN INTERNATIONAL, INC.

Middle East Sun Oil Company
Petrosun Limited
Sun International Limited
  Sun Hydroponics Limited (Bermuda Gardens, LTD.)
  Sun Trading (Caribe) Limited
Sun Oil Trading Company
British Sun Oil Company, Limited
  Sunoco International Limited
Hemisphere Oil Company, Inc. (DEL.)
Hemisphere Oil Company, Inc. (PR)
International Fuel Corporation
Japan Sun Oil Company, LTD.
Liberia Refining Company
Sun Oil Company (Belgium) N.V.
Sun Oil Company (Nederland) B.V.
  B.V. De Lange's Oliehandel, Hoogeveen
  Deluxol Oil Company B.V. (Rotterdam)
Sun Oil GMBH
Sunoco A.G.
Sunoco Limited
  Sunoco Overseas, Inc.
  Sunoco De Chile, LTDA
Sunoco Overseas Limited
    Lugrasa, S.A.
  Sunoco Petrochemicals Limited
Sunray DX Liberia Oil Company
Sunoco Disc, Inc.
Sunoco, Inc.

SUN OIL COMPANY OF PENNSYLVANIA

SUN PETROLEUM PRODUCTS COMPANY, A DIVISION

Carboline Company
- Carboline Eastern Europe
  - Carboline Dubai Corporation
  - Carboline Export Corporation
  - Carboline Far East Corporation
  - Carboline International Corporation
  - Carboline World-Wide Corporation
- The Brentwood Chemical Company

Prestige Lubricants, Inc.
Sun Industrial Development Company
- Sun Coolant Control, Inc.
- Sun Oil Power Services Company
  - Sunohio

Sun Oil Export Company
Sunoco Science and Technological Services, Inc.
Sunolin Chemical Company
Suntech, Inc.
Parachem, Inc.
Riverway, Inc.

SUNMARK INDUSTRIES, A DIVISION

Fast Fare, Inc.
- Fast Fare Markets Of N.C., Inc.
- Fast Fare Markets Of S.C., Inc.
- KWIK-PIK Realty, Inc.
- Mr. Zip, Inc.
- Tiny Tote, Inc.
- Zippy Mart, Inc.
- Zippy Mart Of Alabama, Inc.
- Zippy Mart Of Georgia, Inc.
- Zippy Mart Of South Carolina, Inc.
- Zippy Mart Properties, Inc.

H. H. Palmer, Inc.
Herr Gas & Oil Co.
Hotchkiss Oil Company, Incorporated

Kelly Company
Kenco Petroleum Marketers Incorporated
Lansing-Lewis Company
Lansing Oil Company
Mascot Petroleum Company, Inc.
Mid-State Oil Company
Minnisink Oil Company, Inc.
Modern Oil Company
Mohawk Valley Oil, Inc.
Montour Auto Service Company
Smith Oil Corporation
Stop-N-Go Foods, Inc.
  Buckeye Marketers, Inc.
    Big Top Market, Inc.
  Diversified Retailers, Inc.
  Hoosier Stop-N-Go, Inc.
  J.M.J. Enterprises, Inc.
  Sioux Foods, Inc.
    Casual Food Stores, Inc.
  Stop-N-Go Foods Of Dayton, Inc.
  Stop-N-Go, Inc.
  Stop-N-Go Of Ohio, Inc.
  Stop-N-Go Of Southern Minnesota, Inc.
  Super Go Marketers, Inc.
  Tri-State Stop-N-Go, Inc.
Suncrest Industries, Inc.
Thill Oil Company, Inc.
Travelers Oil Company, Inc.
Your Party Stores, Inc.

HELIOS CAPITAL CORPORATION

Helios Investment Corporation
Beneco Leasing One, Inc.
Beneco Leasing Two, Inc.
Beneco Leasing Three, Inc.
Beneco Leasing Four, Inc.
Heleasco One, Inc.
Heleasco Two, Inc.

Heleasco Three, Inc.
Heleasco Four, Inc.
Heleasco Five, Inc.
Heleasco Six, Inc.
Heleasco Seven, Inc.
Heleasco Eight, Inc.
Heleasco Nine, Inc.
Heleasco Ten, Inc.
Heleasco Eleven, Inc.
Heleasco Twelve, Inc.
Heleasco Thirteen, Inc.
Heleasco Fourteen, Inc.
Heleasco Fifteen, Inc.
Heleasco Sixteen, Inc.
Heleasco Seventeen, Inc.
Heleasco Eighteen, Inc.
Heleasco Nineteen, Inc.
Heleasco Twenty, Inc.
Heleasco Twenty-One, Inc.
Heleasco Twenty-Two, Inc.
Heleasco Twenty-Three, Inc.
Heleasco Twenty-Four, Inc.
Heleasco Twenty-Five, Inc.
Heleasco Twenty-Six, Inc.
Heleasco Twenty-Seven, Inc.
Heleasco Twenty-Eight, Inc.
Heleasco Twenty-Nine, Inc.
Heleasco Thirty, Inc.
Heleasco Thirty-One, Inc.
Heleasco Thirty-Two, Inc.
Heleasco Thirty-Three, Inc.
Heleasco Thirty-Four, Inc.
Kee Leasing Company
650 Leasing Company
652 Leasing Company
653 Leasing Company
666 Leasing Company
667 Leasing Company

670 Leasing Company
673 Leasing Company
675 Leasing Company
Sun Leasing Company

RADNOR CORPORATION

Langford Farms Country Club, Inc.
Morgan's Run Corporation
Olney Oaks Land Development Corporation
Radnor/Aire Corporation
Radnor/Anderson Corporation
Radnor/Arlington Corporation
Radnor/Aston Corporation
Radnor/Birmingham Corporation
Radnor/Bloomfield Hills Corporation
Radnor/Brownsboro Corporation
Radnor/Brown Street Corporatfon
Radnor/Castleton Corporation
Radnor/Centre Corporation
Radnor/Cherry Tree Corporation
Radnor/Dearborn Heights Corporation
Radnor Development Corporation
Randor/Dixie Corporation
Radnor/Eastown Corporation
Radnor/Fairland Corporation
Radnor/Grand Rapids Corporation
Radnor/Greenhouse Corporation
Radnor/Hampton Corporation
Radnor Homes, Inc.
Radnor/Hunters Pointe Corporation
Radnor/Hurstbourne Corporation
Radnor/I-95 Industrial Park Corporation
Radnor/Investment Corporation
Radnor/Island Corporation
Radnor/Jacksonville Corporation
Radnor/Juno Corporation
Radnor/Jupiter Coproration
Radnor/Jupiter Inlet Corporation

Radnor/Laguna Hills Corporation
Radnor/Matsonford Corporation
Radnor/Michigan Corporation
Radnor/Mishawaka Corporation
Radnor/Nashville Corporation
Radnor/National Square Corporation
Radnor/Newtown Corporation
Radnor/Northwood Corporation
Radnor/Oakland Corporation
Radnor/Oceana Corporation
Radnor/Oceana South Corporation
Radnor Of Hutchinson Island Corporation
Radnor/Orange Corporation
Radnor/Pennell Corporation
Radnor/Perimeter Park Corporation
Radnor/Portsmouth Corporation
Radnor/Ridge Corporation
Radnor/Route 100 Corporation
Radnor/Sandalwood Corporation
Radnor/Service Corporation
Radnor/Siesta Key Corporation
Radnor/St. Lucie Corporation
Radnor/Sugarland Corporation
Radnor/Uwchlan Corporation
Radnor/Valley Wood Corporation
Radnor/Viewpointe Corporation
Radnor/West Palm Beach Corporation
Radnor/West Palm Beach No. 2 Corporation
Striker, Inc.

ENVIRONMENTAL SERVICES OF NEW JERSEY, INC.

Environmental Waste, Inc.

SUN DISTRIBUTOR, INC.

American Electric Company
  Philips & Company, Columbia, Missouri
Atlas Screw & Specialty Co., Inc.
Dorman Products, Inc.

Federal Pipe And Steel Corporation
General Industrial Supply Corp.
Harding Glass Industries, Inc.
  Roto-Swing, Inc.
J. N. Fauver Co., Inc.
  J. N. Fauver (Canada) Limited
Kar Products, Inc.
Raub Supply
Special-T-Metals Co., Inc.
Walter Norris Corporation
Winter Acquisition Corp.

SUN INFORMATION SERVICES COMPANY

Applied Financial Systems, Inc.
Catallactics Corporation
NMF, Inc.
Sun Services Corporation
The Weiland Computer Group, Incorporated
  Financial Independents, Inc.
  Independent Bank Computer Corporation

TOTEM OCEAN TRAILER EXPRESS, INC.

ELK RIVER RESOURCES, INC.

Jewell Resources Corporation
  Anchor Red Ash Coal Corporation
  Cumberland Collieries, Inc.
  Dominion Coal Corporation
  Jewell Coal And Coke Company, Inc.
  Jewell Smokeless Coal Corporation
  Jewell Supply Company
  Oakwood Red Ash Coal Corporation
  Vansant Coal Corporation
Shamrock Resources Corporation
  Clover Coal Company, Inc.
  Enexco, Inc.
  Fourleaf Coal Company, Inc.
  Freedom Coal Company, Inc.
  Greenleaf Equipment Company

Greenwood Land & Mining Company
Plymouth Coal Company, Inc.
Shamrock Coal Company, Incorporated
West Virginia Resources Corporation
Oneida Coal Company, Inc.
Scott Equipment Company
Wolf Creek Coal Company

SUNOCO ENERGY DEVELOPMENT CO.

Bighorn Ranch, Inc.
Sunedco Coal Co.
Sweetwater Coal Development Co.
Cordero Mining Co.
White River Shale Oil Corporation

SUN OCEAN VENTURES, INC.

Deepsea Ventures, Inc.
Ocean Mining Associates

CORPORATE HEADQUARTERS

Alliance Enterprise Corporation
Sun Exchange, Inc.
Becton, Dickinson And Company

SUN VENTURES, INC. (PA)

International Biomedical Instruments, Inc.
License Royalty Corporation
Pentagon Industries
Universal Audio, Inc.
Sun Ventures, Inc. (DE)
The VLM Corporation

FINANCIAL COMPANIES

Ardprop, Inc.
Ardvest, Inc.
Sun-Del Services, Inc.
Sun International Finance Corporation
The Claymont Investment Company
Sunoco Credit Corporation
Helios Assurance Company, Ltd.

Oil Insurance Limited
Solcar Properties, Inc.
Warbonnet Company
Thunderbird Stations, Inc.
Second Thunderbird Stations, Inc.
Third Thunderbird Stations, Inc.
Fourth Thunderbird Stations, Inc.

INACTIVE COMPANIES

CAN-AM Barge Company, Inc.
Caribe Sun Oil Company
Corpus Christi Refining, Inc.
Duncan Refining Company, Inc.
Sun Zippy, Inc.
The Sun Securities Corporation

ATLANTIC RICHFIELD COMPANY

Alyeska Pipeline Service Company
Anaconda-Ericcson Inc.
Badger Pipe Line Company
Black Lake Pipe Line Company
Chapin, Kieley & Howe, Inc.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Flower Street Limited
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Iricon Agency Ltd.
Kenai Pipe Line Company
Lavan Petroleum Co.
Montoro, Empresa Para La Industria Quimica
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
Ontario Terminals Inc.

Platte Pipe Line Company
Sinclair Venezuelan Oil Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company

CHEVRON U.S.A., INC.

Standard Oil Company of California
AMAX Inc.
American Overseas Petroleum Limited
Pars Investment Corporation
Chevron Oil Company (Nigeria)
Cetus Corporation
Irving Oil Company, Limited
Irving Oil Limited
Eastern Oil and Service Stations Ltd.
Irving Oil Limited
Aditivos Mexicanos, S.A.
Cansulex Limited
Chevron Chemical S.A.
BP-California Limited
Chevron Chemical Company S.A.F.
Chevron Quimica do Brasil Ltda.
Asfaltos Chevron S.A.
Chevron Oil Europe (Services), Inc.
Coromandel Fertilisers Limited
Insecticidas Ortho, S.A.
Karonite Chemical Company, Limited
Nippon Petroleum Detergent Company, Limited
Orobis Limited
Orogil, S.A.
Societe Calgil
Petrosynthese, S.A.
Quimicas Ortho de California, Limitada
Chevron do Brasil Participacoes e Empreendimentos Ltda.
C-W Properties, Inc.
Glenwood Properties
Arabian American Oil Company

Calpam B.V.
Calpam Luxembourg S.A.R.L.
Caltex Mediterranean Limited
Caltex Deutschland G.m.b.H.
Hydrantenbetriebsgesellschaft
Deutscher Kraftverkehr Ernst Grimmke G.m.b.H.
Nord-West Kavernengesellschaft G.m.b.H.
Rhein-Main-Rohrleitungstransport G.m.b.H.
Aircraft Fuel Supply B.V.
Calpam Vloeibaar Gas B.V.
City Parkeergarage (City Parking) B.V.
Deventer Ijssportcentrum N.V.
Maasvlakte Olie Terminal N.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) B.V.
A/S Hydrantanlaegget Koebenhavns
Lufthavn, Kastrup
Provestenens Dampforayning Nord A/S
Chevron Oil Europe (Services), Inc.
DE.BA.-Deposito di Bari — S.p.A.
MARS-Milan Airport Refuelling Service S.p.A.
Raffineria di Roma S.p.A.
Seram — S.p.A.
VECAL — Veneta Carburanti Lubrificanti S.p.A.
Chevron Oil Sales Company
Chevron Oil Europe (Services), Inc.
BP-California (Grangemouth) Limited
Hertfordshire Oil Storage Limited
Hydrant Servicing Company Limited
United Kingdom Oil Pipelines Limited
Warwickshire Oil Storage Limited
Saraco S.A.
UBAG — Unterflurbetankungsanlage
Flughafen Zurich
Chevron Transport Corporation
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
Combugaz
Petroleum Products Storage and Transport
Company, Societe Anonyme

Societe Belge de Transport par Pipeline
Societe Anonyme
Rotterdam-Antwerpen Pijpleiding (Belgie) N.V.
Societa per Azioni Raffineria Padana Olii
Minerali SARPOM
The Associated Octel Company Limited
A.K. Chemie G.m.b.H. & Co. K.G. (a partnership)
Associated Octel Co. (South Africa) (Proprietary) Limited
Societa Italiana Additivi per Carburanti (S.I.A.C.)
Societe Octel-Kihlmann
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Chevron Oil Company of Portugal
S.A. Escuela Bella Vista
Shale Oil Syndicate, Inc.
Rimbey Pipe Line Co., Ltd.
Sultran Ltd.
Chevron Transport Corporation
Oleoducto del Zulia, S.A.
Atlas Supply Company
Canyon Reef Carriers, Inc.
Compania Comercial Chevron S.A. (Inactive
Felix Oil Company
Kenai Pipe Line Company
Kentucky Agricultural Energy Corporation
Long Beach Oil Development Company
Plantation Pipe Line Company
Societe de Manutention de Carburants Aviation de Tahiti
Standard Pacific Gas Line Inc.
Compania Comercial Conchan S.A. (Inactive)
Compania de Niquel Colombiano, S.A.
Compania de Petroleo Chevron S.A.
Cornwallis Arctic Oils Limited
Crest Exploration Limited
Freeport Bunkering Co. Limited (Inactive)
Freeport Trading Co. Limited
Marine Agents & Brokers Limited
Nepco Towing Company Limited
First Colony Life Insurance Company

Huntington Beach Company
Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
P.T. Caltex Pacific Indonesia
Refineria Petrolera de Guatemala-California, Inc.
Caltex Petroleum Corporation
Australian Lubricating Oil Refinery Limited
Boral Limited
Boral Basic Industries Limited
Petrochemical Holdings Limited
Petroleum & Chemical Corp. (Aust.) Limited
Queensland Oil Refineries, Pty., Limited
Botany Bay Tanker Company (Australia) Pty. Limited, The
Changi Airport Fuel Hydrant Installation Pte. Limited
Phoenicia Oil Company S.A.L.
New Zealand Refining Company Ltd., The
The Texas Company (New Zealand) Limited (Inactive)
South Africe Oil Refinery (Pty) Limited
Ndola Oil Storage Company, Limited
Honam Oil Refinery Company, Limited
Korea Tanker Company, Limited
Batangas Land Company, Inc.
Central African Petroleum Refineries (Private) Limited
Singapore Refining Company Private Limited
East African Oil Refineries Limited
Signapore Refining Company Private Limited
Koa Oil Company, Limited
Nippon Oil Staging Terminal Company, Limited
Tokyo Tanker Company, Limited
Ampol Petroleum Limited
Australian Lubricating Oil Refinery Limited
H.C. Sleigh Limited
Australian Lubricating Oil Ref. Limited
Botany Bay Tanker Company (Australia) Pty. Limited, The
Mediterranean Refining Company
Nippon Petroleum Refining Company, Limited
Tokyo Tanker Company, Limited
Nippon Oil Staging Terminal Company, Limited

Pakistan Refinery Limited
Philippine Petroleum Corporation
Societe Reunionnaise Dientreposage
West Australia Petroleum Pty. Limited

EXXON CORPORATION

None.

SHELL OIL COMPANY

Royal Dutch Petroleum Company
Shell Petroleum, N.V.
The "Shell" Transport and Trading Company, Limited
Basin Pipe Line System
Bullenbay Marine Services, N.V.
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Gravcap, Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine
Pollution Compensation Limited
Olympic Pipe Line Company
Ozark Pipe Line System
Penn Central Corporation
Plantation Pipe Line Company
Rancho Pipe Line System
Seadock, Inc.
Ship Shoal Pipe Line System
Thums Long Beach Company
West Shore Pipe Line Company

WIDC (Wyoming Industrial Development Corporation)
Wolverine Pipe Line Company

TEXACO INC.

United States

Badger Pipe Line Company
Colonial Pipeline Company
Coltexo Corporation
Explorer Pipeline Company
Jefferson Chemical Company, Inc.
Kaw Pipe Line Company
Laurel Pipe Line Company
LOOP Inc.
Olympic Pipeline Company
Texaco-Cities Service Pipe Line Company
Texaco Development Corporation
Texaco Financial Services Inc.
Texaco International Trader Inc.
Texaco Ventures Inc.
Texas-New Mexico Pipe Line Company
Texas-U.S. Chemical Company
The Texas Pipe Line Company
THUMS Long Beach Company
Whitney Supply Company
Wolverine Pipe Line Company
Wyco Pipe Line Company

Canada

Texaco Canada Inc. and subsidiaries
Texaco Chemicals Canada, Ltd.

Latin America

Heddington Insurance Limited
Lubricantes y Tambores del Ecuador, C.A.
Panama Exploration Inc.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Societe Antillaise des Petroles Texaco

Societe Anonyme de le Raffinerie des Antilles
Texaco Antilles Limited
Texaco Bahamas Limited
Texaco Belize Limited
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Chile S.A.C.
Texaco Guatemala Inc.
Texaco Interamerica Exploration Company
Texaco Mexicana, S.A.
Texaco Oil Company
Texaco Panama Inc.
Texaco Paraguay Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.
Texaco Trinidad, Inc.
Texaco Uraguay Sociedad Anonima
Texaco West Indies Limited
Texaco Petroleum Company
The Pipeline of Puerto Rico, Inc.

Europe

Caltex Deutschland GmbH
Caltex Oil S.A.E.
Caltex (Kalteks) Petrol A.S.
Deutsche Texaco A.G. and subsidiaries
Irish Refining Company Ltd.
Mainline Pipelines Ltd.
Norsk Texaco Oil A/S
N.V. Rotterdam Rijn Pijpleiding
Maatschappij
OMW Oberrheinische
Mineralolweke GmbH
Pembroke Cracking Company
Rhein-Main
Rohrleitung-transportgesellschaft
Skandinaviska Raffinaderi
Aktiebologet Sconraff

Societa per Azioni Raffineri Padana
Olii Minerali
s.a. Texaco Belgium n.v.
Texaco A.G.
Texaco Austria Gesellschaft m.b.H.
Texaco Canarias S.A.
Texaco Denmark Inc.
Texaco France S.A.
Texaco Germany Petroleum Inc.
Texaco Greek Petroleum Company S.A.
Texaco A/S
Texaco International Financial Corporation
Texaco (Ireland) Limited
Tesaco Limited and subsidiaries
Texaco Luxembourg S.A.
Texaco Malta Inc.
Texaco Netherlands Inc.
Texaco North Sea Norway A/S
Texaco North Sea U.K. Company
Texaco Norway A/S
Texaco Oil Aktiebolag
Texaco Olie Maatschappij B.V.
Texaco Overseas Tankship Limited
Texaco Portuguesa de Petroleos, Lda.
Texaco Services (Europe) Ltd.
Texaco S.p.A.
Texaco (Spain) Inc.
Transalpine Pipeline
United Kingdom Oil Pipelines, Ltd.

Middle East, Far East, Africa

Arabian American Oil Company
Mitsui-Texaco Chemicals Company, Ltd.
P.T. Caltex Pacific Indonesia
Societe Malienne des Petroles Texaco
Texaco Africa Ltd.
Texaco Angola-Prospeccao e Producao S.A.R.L.
Texaco Cote d'Ivoire

Texaco Egypt Inc.
Texaco Ghana Limited
Texaco Gabon
Texaco Haute Volta
Texaco Hong Kong Limited
Texaco Indonesia Corporation
Texaco Jambi Inc.
Texaco Japan Inc.
Texaco Korea Inc.
Texaco Marine Investments Ltd.
Texaco Maroc
Texaco Natuna Inc.
Texaco Nauka Inc.
Texaco Niger Inc.
Texaco Nigeria Limited
Texaco Orient Petroleum Company
Texaco Overseas (Nigeria) Petroleum Company
Texaco Overseas Petroleum Company
Texaco Saudia Inc.
Texaco Zaire Inc.

AMERADA HESS CORPORATION

SUBSIDIARIES

Anglomar Shipping Company Ltd. (United Kingdom)
Bushehr Petroleum Co. (Iran)
Conmar Terminals, Ltd. (Canada)
D'Ippolito Oil Company (Delaware)
Esperanza Petroleum Corporation (Delaware)
First United Shipping Corp. (Liberia)
Interocean Tanker Corp. (Liberia)
Matco Tankers (U.K.) Ltd. (United Kingdom)
Meadville Corporation (New Jersey)
Minas y Petroleos del Ecuador (Ecuador)
Oasis Oil Company of Libya, Inc. (Delaware)
Ontario Terminals, Inc. (Pennsylvania)
Petroleos Yasuni, C.A. (Ecuador)
Reserve Terminal Corporation (New Jersey)

St. Croix Petrochemical Corp. (U.S. Virgin Islands)
Second Reserve Terminal Corp. (New Jersey)
Second United Shipping Corp. (Liberia)
Solar Gas, Inc. (Nevada)
South Jersey Terminal Corp. (New Jersey)
Third United Shipping Corp. (Liberia)
Wyatt, Inc. (Connecticut)

Affiliates

Ariadne Co., L.P. (Delaware)
Artemis Marine Co., L.P. (Delaware)
Atlas Marine Co. (New York)
Granreunion Co. (Liberia)

No. 80-1813

FILED

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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners*,

v.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents*.

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners*,

v.

TEXACO INC., *Respondent*.

ELLA T. GRASSO, Govenor of the State of Connecticut, et al., *Petitioners*,

v.

AMERADA HESS CORPORATION, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

[Counsel Listed On Inside Cover]

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Getty Refining and
Marketing Company
Gulf Oil Corporation
Sun Oil Company of
Pennsylvania
Atlantic Richfield Company
Chevron U.S.A. Inc.
Exxon Corporation
Shell Oil Company

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QUESTIONS PRESENTED*

1. Did the Court of Appeals for the Second Circuit correctly hold that the Temporary Emergency Court of Appeals had exclusive jurisdiction to decide whether section 13(b) of Connecticut Public Act No. 80-71 is preempted by the federal Emergency Petroleum Allocation Act?

2. Did the Court of Appeals for the Second Circuit correctly hold that the Temporary Emergency Court of Appeals had exclusive jurisdiction to determine whether the District Court correctly decided that the abstention doctrine should not be applied in this case?

3. Did the Court of Appeals for the Second Circuit correctly conclude that this action was not barred by 28 U.S.C. §1341?

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* Respondents' listing pursuant to Rule 28.1 is contained in a separate appendix.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. This Case Does Not Warrant Review	5
II. The Court Of Appeals Was Entirely Correct In Dismissing The Petitioners' Appeal On The Issues Of Preemption And Abstention	7
A. The Temporary Emergency Court Of Appeals Had Exclusive Jurisdiction Over The Preemption Issue	7
B. The Temporary Emergency Court Of Appeals Had Exclusive Jurisdiction Over The Abstention Issue	13
III. The Appeals Court Properly Held That 28 U.S.C. §1341 Did Not Bar The District Court Actions	15
IV. Petitioners' Failure To File A Timely Appeal With The Temporary Emergency Court Of Appeals Does Not Warrant Extraordinary Relief By This Court	15
CONCLUSION	19

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TABLE OF AUTHORITIES

CASES: PAGE

A.F.L. v. *Watson*, 327 U.S. 582 (1946) 9

ARCO v. *Tribbit*, 399 A.2d 535 (Del. Ch. 1977) 13

Bray v. *U.S., 423 U.S. 73 (1975)* 7, 14

Butler v. *Dexter*, 425 U.S. 262 (1976) 17

Chicago and Northwestern Transportation Co. v. *Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232 (1981) 12

Citronelle-Mobile Gathering, Inc. v. *Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979) 6, 8, 10, 12

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 9

City of New York v. *New York Tel. Co.*, 468 F.2d 1401 (TECA 1972) 14

Coastal States Marketing, Inc. v. *New England Petro. Corp.*, 604 F.2d 179 (2d Cir. 1979) 6, 7, 8, 10, 16

Gully v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934) 17, 18

Harman v. *Forssenius*, 380 U.S. 528 (1965) 14

Harris Truck Lines v. *Cherry Meat Packers*, 371 U.S. 215 (1962) 16

International Ladies' Garment Workers' Union v. *Donnelly Garment Co.*, 304 U.S. 243 (1938) 17, 18

Ivy Broadcasting Co. v. *AT&T*, 391 F.2d 486 (2d Cir. 1968) 12

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 11

MTM Inc. v. *Baxley*, 420 U.S. 799 (1975) 17

Maryland v. *Exxon Corp.*, 370 A.2d 1102 (Md. 1977), *aff'd* 437 U.S. 117 (1978) 13

Mitchell v. *Donovan*, 398 U.S. 427 (1970) 17

Mobil Oil Corp. v. *Dubno*, 492 F.Supp. 1004 (D. Conn. 1980) 3, 9, 11, 13, 15

Table of Authorities Continued

CASES: PAGE

Mobil Oil Corp. v. *Dubno*, 639 F.2d 919 (2d Cir. 1981) 4, 9, 10, 13, 14, 15

Mobil Oil Corp. v. *Tully*, 499 F.Supp. 888 (N.D.N.Y. 1980) 3, 16

Mobil Oil Corp. v. *Tully*, 639 F.2d 912 (2d Cir. 1981) ... 10

Mountain Fuel Supply Co. v. *Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) 6, 8, 10, 12

M. Spiegel & Sons Oil Corp. v. *B.P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976) 6, 8, 10, 12

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U.S. 386 (1934) 17, 18

Phillips v. *U.S.*, 312 U.S. 246 (1941) 17

Quincy Oil Inc. v. *F.E.A.*, 620 F.2d 890 (TECA 1980) .. 14

Railroad Commission v. *Pullman*, 312 U.S. 496 (1941) .. 13

Reed v. *Kroger Co.*, 478 F.2d 1268 (TECA 1973) 17

Shulthis v. *McDougal*, 225 U.S. 561 (1912) 12

Standard Oil Co. v. *D.O.E.*, 596 F.2d 1029 (TECA 1978) 14

Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 9

T.B. Harms Co. v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) 12

Texaco Inc. v. *D.O.E.*, 616 F.2d 1193 (TECA 1979) 6, 8, 10

U.S. v. *Cooper*, 482 F.2d 1393 (TECA 1973) 16

U.S. v. *Corrick*, 298 U.S. 435 (1936) 17, 18

U.S. v. *Robinson*, 361 U.S. 220 (1960) 16

William Jameson & Co. v. *Morgenthau*, 307 U.S. 171 (1939) 17, 18

Table of Authorities Continued

STATUTES: PAGE

Economic Stabilization Act of 1970 (ESA), P.L. 91-379, 12 U.S.C. §1904 note 7, 16

Emergency Petroleum Allocation Act of 1973 (EPAA), P.L. 93-159, 15 U.S.C. §§751-760h ..... *passim*

Tax Injunction Act, 28 U.S.C. §1341 ..... 3, 4, 5, 15

28 U.S.C. §1253 17

28 U.S.C. §2281 15

42 U.S.C. §6421 10

Act Concerning State Revenue for the Fiscal Year Commencing July 1, 1980, Conn. Public Act No. 80-71, codified at Conn. Gen. Stat. §§12-587 to 12-602 (1981) ..... *passim*

ADMINISTRATIVE ACTIONS:

41 Fed. Reg. 40452 (1976) 11

MISCELLANEOUS:

Hearings before Conn. Finance, Revenue and Bonding Committee, January 29, 1980 2

Transcript of Debate in Conn. House of Representatives, April 11, 1980 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1813

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners,*

v.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents.*

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners,*

v.

TEXACO INC., *Respondent.*

ELLA T. GRASSO, Govenor of the State of Connecticut, et al., *Petitioners,*

v.

AMERADA HESS CORPORATION, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Connecticut Public Act No. 80-71 became effective on July 1, 1980. Section 1 of that Act imposed a two precent tax on the "gross earnings" derived by integrated petroleum companies from sales of petroleum products in Connecticut. Respondents are all subject to the tax, and they have been paying the tax as it has fallen due.

In addition to imposing a tax on Respondents, the Act also contained a provision designed to control the prices of certain petroleum products sold in Connecticut. That provision, section 13(b) of the Act, Pet. App. 45a, prohibited any petroleum company subject to the tax imposed by section 1 of the Act from raising its wholesale price in Connecticut for any product exempt from the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159, 15 U.S.C. §§751-760h) ("EPAA") by more than the average increase in its wholesale price for that product in all ports on the eastern coast of the United States. The obvious and explicit purpose of this price control provision was to force the Respondents to recover the cost of the new tax, to the extent that market forces allowed them to recover it at all, in their prices throughout the eastern United States.[1] The legislature

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[1] "I think [in] making some of our fellow Americans in Louisiana and in the southeast and the oil-producing states[,] which both in terms of their economy and in terms of their revenues have reached [sic] an extraordinary bounty at our detriment [pay the Connecticut tax] . . . I've invented an idea which makes sense in terms of fundamental fairness and it makes sense in terms of practicality." Tr. of hearings before the Finance, Revenue and Bonding Committee, January 29, 1980 at 8 (remarks of Sen. Curry). *See also* Tr. of debate in the Connecticut House of Representatives, April 11, 1980, at 154 (comment of Rep. Lavine) ("Frankly, Mr. Speaker, I'm supportive of taxing the oil companies, I'm just not supportive of passing that tax through to the citizens of Connecticut.")

realized, as the District Court found, 492 F. Supp. at 1006, Pet. App. 9a, that in the absence of a provision such as section 13(b) the cost of the gross receipts tax would ordinarily be passed on to consumers in the state that imposed the tax.

Respondents sought declaratory and injunctive relief in the District Court from enforcement of the price control provisions of the Act. They did not challenge the tax imposed by the Act. Respondents claimed in District Court that the price control provision was preempted by the EPAA and was repugnant to the Commerce Clause and to the Due Process Clause of the United States Constitution.

Without reaching the constitutional claims, the Court held that section 13(b) was in conflict with the federal energy policy established by the EPAA and the implementing regulations issued thereunder and therefore preempted under the Supremacy Clause of the United States Constitution. As befits any preemption analysis, the District Court reached its decision after engaging in a thorough analysis of the applicable provisions of the EPAA, its legislative history and the regulations promulgated thereunder. 492 F. Supp. at 1006-09, 1011-15; Pet. App. 11a-15a, 19a-27a. The District Court denied *sub silentio* the Petitioners' motion to dismiss which was based on the doctrine of abstention and the Tax Injunction Act, 28 U.S.C. §1341.

On August 11, 1980, the last day possible, Petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Second Circuit. During the pendency of that appeal, the District Court for the Northern District of New York rendered its decision in the case of *Mobil Oil Corp.* v. *Tully,* 499 F. Supp. 888 (N.D.N.Y. 1980), a case involving a New

York price control provision similar to the price control provision in the Connecticut statute. The New York State defendants in *Tully* also appealed to the Second Circuit, and the two appeals were treated as companion cases by the Court of Appeals.

Respondents moved to dismiss the appeal on the ground that the Temporary Emergency Court of Appeals ("TECA") had exclusive jurisdiction over the appeal. Similar motions were filed in the companion case. The Court of Appeals held that the TECA had exclusive jurisdiction to review the merits of the District Court's holding as to preemption and to consider the Petitioners' claim that the District Court should have abstained. Accordingly, the Court of Appeals dismissed the appeal as to those claims. The Court of Appeals held that it did have jurisdiction to consider the claim that the District Court judgment was barred by 28 U.S.C. §1341 and affirmed the District Court on that issue. 639 F.2d 919, Pet. App. 1a.

The New York defendants in the companion case proceeded to present their claims on the merits of the District Court's judgment to the TECA.[2] The Connecticut defendants did not file a notice of appeal with the TECA and therefore proceeded by means of their petition for certiorari in this Court. While the New York defendants have also sought review in this Court, their petition is limited to the District Court's holding that section 1341 did not bar the New York action.

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[2] The TECA heard arguments on the merits in the New York case on April 2, 1981. The New York defendants had not raised an abstention claim.

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that exclusive appellate jurisdiction of an issue arising under the EPAA rests with the TECA. On that issue, there is no conflict or disagreement among the lower courts, nor is there any apparent reason for review by this Court. Similarly, there is no disagreement among lower courts that two of the issues determined by the District Court, preemption of a state statute by the EPAA and the applicability of the abstention doctrine to a claim that a state statute is preempted by the EPAA, were issues arising under the EPAA. The determinations below are consistent with the decisions of this Court.

The Court of Appeals correctly decided that the Tax Injunction Act, 28 U.S.C. §1341, is inapplicable where the tax is being paid and collected and is not under challenge.

Since the judgments below were plainly correct, there is no justification for vacating those judgments in order to relieve Petitioners of the consequences of their failure to follow proper appellate procedure.

ARGUMENT

I. This Case Does Not Warrant Review

The principal question presented by this case is whether the Court of Appeals correctly held that it did not have appellate jurisdiction to review the preemption and abstention issues presented to it by the Petitioners.[3]

[3] The minimal attention Petitioners devote to their argument that the Court of Appeals erred in rejecting their claims with regard to section 1341, Pet. 21, is a tacit admission that their argument is, to say the least, weak. Review of the section 1341 argument is clearly not warranted. *See* p. 15, *infra*.

That question does not warrant review by this Court. No issue of national significance would be resolved by granting certiorari in this case because no issue of national significance is presented, and no conflict among the lower federal courts would be settled because none exists.

The allocation of jurisdiction between the TECA and the courts of appeals is not a matter of dispute among the lower courts. Rather, the courts of appeals and the TECA have agreed that the TECA has exclusive appellate jurisdiction to review adjudications of "EPAA issues" by a district court. Neither the courts of appeals nor the TECA have had any difficulty in identifying such issues. *See Texaco Inc.* v. *D.O.E.*, 616 F.2d 1193 (TECA 1979); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F. 2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976).

Although Petitioners claim that there is a conflict between the decision below and decisions of the TECA and of this Court, Pet. 6, they do not identify any such conflict. All Petitioners do is indicate that both the TECA and this Court have recognized that the TECA's jurisdiction is limited. Nothing in the decision below conflicts with this principle. The Court below simply held that under the standards that all courts have adopted to define the extent of the TECA's limited jurisdiction, the preemption and abstention issues involved in this case can be heard on appeal only by the TECA.

There is also no unresolved question of national importance presented by this petition. Petitioners' challenge to the jurisdictional decision of the Court of Appeals is necessitated solely by Petitioners' failure to follow the clear advice of the Court of Appeals that litigants file dual notices of appeal in cases involving EPAA issues. *See Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 186 n.9. In short, this petition presents a case of significance only to the parties.

II. The Court Of Appeals Was Entirely Correct In Dismissing The Petitioners' Appeal On The Issues Of Preemption And Abstention

A. The Temporary Emergency Court of Appeals had exclusive jurisdiction over the preemption issue

Section 5(a)(1) of the EPAA, codified in 15 U.S.C. §754(a)(1)(A), incorporates the judicial review provisions of the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 796 ("ESA"), by providing that those judicial review provisions shall apply to any regulation, order, or action taken by the President (or his delegate) under the EPAA "as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970." Section 211(b)(2) of the ESA, 12 U.S.C. §1904 note, provides that the TECA has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the ESA] or under regulations or orders issued thereunder."[4]

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[4] Section 211(b)(2) "carved out a limited exception to the broad jurisdiction of the courts of appeals" the purpose of which is "to assure uniform interpretation . . ." of the energy laws. *Bray* v. *United States,* 423 U.S. 73, 74-75 (1975).

The Court of Appeals' analysis and conclusion that the TECA had exclusive jurisdiction over the issue of whether the EPAA preempts section 13(b) are fully consistent with the line of authority that has defined the TECA's jurisdiction. Petitioners concede the basic premise that the TECA's exclusive jurisdiction includes cases that arise under the EPAA. Pet. 7,8. They focus instead upon the issue of whether the present case is one "arising under" the EPAA. The standard for such an inquiry is clear — the court must decide "whether an EPAA question has been adjudicated." *Texaco Inc* v. *D.O.E., supra,* 616 F.2d at 1198, *citing Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 187. If it has, the TECA has exclusive jurisdiction over that EPAA issue and the appropriate Court of Appeals has jurisdiction over other substantive issues in the same case. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 182.

The standard for determining whether an EPAA question has been adjudicated has also been clearly delineated. An EPAA question is adjudicated if the case has required "application and interpretation of the EPAA . . . ." *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra,* 591 F.2d at 716. *See also, Mountain Fuel Supply Co.* v. *Johnson, supra* (exclusive jurisdiction in the TECA where the "construction, applicability and effect" of the EPAA is involved); *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp., supra* ("construction of the EPAA" required). Under this standard the TECA's exclusive jurisdiction in the present case is apparent because the District Court's decision on the preemption issue embodies an extensive construction and interpretation of the EPAA.

In preemption cases the court's analytical duty "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co.* v. *Wickham,* 382 U.S. 111, 120 (1965). Such cases turn on the peculiarities and special features of the federal statute or regulation involved. *See City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 638 (1973). For this reason, preemption cases have uniformly been held to "arise under" the preempting statute, not under the Supremacy Clause. *See, e.g., Swift & Co.* v. *Wickham, supra; A.F.L.* v. *Watson,* 327 U.S. 582, 591 (1946).

Thus, it was absolutely necessary for the District Court to become, as it did, intricately involved in the construction and interpretation of the EPAA, its legislative history and the regulations promulgated thereunder, in order to decide that section 13(b) was preempted. 492 F.Supp. at 1006-09, 1011-15, Pet. App. 11a-15a, 19a-27a. Reviewing that decision, the Court of Appeals reached the only conclusion it could:

> Because this decision [the district court's] necessarily involved a thorough analysis of the EPAA and the Mandatory Price Regulations . . . the district judge adjudicated an ESA (EPAA) issue and, therefore, exclusive jurisdiction over this part of the case lies with TECA pursuant to 15 U.S.C. §754(a)(1).

639 F.2d at 921, Pet. App. 5a.

Petitioners rely on a number of unsupportable assertions in an effort to obscure the plain validity of the Court of Appeals decision. Each of their claims was considered by the Court of Appeals and properly rejected.

First, the Petitioners charge that the Court of Appeals "completely ignored" their claim that this case

arose under the EPAA itself and not under a "regulation promulgated under section 753(a) [of the EPAA], . . . any order under [the EPAA], [or] any action taken by the President (or his delegate) under [the EPAA]," as is required by the jurisdictional provision of section 754(a)(1)(A). Pet. 7. The fact is that the Court of Appeals did consider this argument and flatly rejected it. *Mobil Oil Corp.* v. *Tully, supra,* 639 F.2d at 916, Pet. App. 36a-37a.

Moreover, the extremely narrow interpretation of the jurisdictional provision of section 754(a)(1)(A) urged by Petitioners is contrary to the uniform interpretation given this provision by the courts of appeals and the TECA.[5] In addition, the "regulation promulgated under Section 753(a) of [the EPAA]" referred to in §754(a)(1)(A) includes not only the original program of price controls but also the exemptions therefrom, exemptions which are accomplished by amendment to "the regulations". 15 U.S.C. §760a(b). Respondents' preemption claim in the District Court plainly arose under the regulations because it hinged on the interpretation accorded the exemption process. The exemptions also constitute "actions" and "orders taken by the President (or his delegate) under this chapter" within the meaning of section 754(a)(1)(A). *See* 15 U.S.C. §§760(b)(2), 760a(b).[6]

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[5] *See Texaco Inc.* v. *D.O.E., supra,* 616 F.2d at 1195; *Coastal States Marketing, Inc.* v. *New England Petroleum Corp., supra,* 604 F.2d at 182; *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra,* 591 F.2d at 715; *Mountain Fuel Supply Co.* v. *Johnson, supra,* 586 F.2d at 1379; *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp., supra,* 531 F.2d at 670.

[6] Before the President could remove a petroleum product from the list of products under active price control under the EPAA, he or his delegate was required to transmit to Congress an "energy action," 15 U.S.C. §760a(c)(2); 42 U.S.C. §6421(a)(6). *See, e.g.,*

Petitioners' second argument is that this action arises under the explicit preemption provision of the EPAA, 15 U.S.C. §755(b),[7] and that actions under section 755(b) are not within the appellate jurisdiction of the TECA. This argument misconstrues the plain language of the applicable statutes.

The TECA has exclusive appellate jurisdiction over cases arising under regulations, orders or actions under the EPAA. Since section 755(b) requires an analysis of EPAA regulations and orders to determine if there is a conflict with a state law, any action "arising under" section 755(b) must also arise under an EPAA regulation or action. An appeal of a holding based on section 755(b) is therefore necessarily within the exclusive TECA jurisdiction contemplated by 15 U.S.C. §754.[8] Petitioners offer no legislative history or judicial decision which remotely suggests a contrary conclusion.

Petitioners' third argument is that an EPAA issue arises only if the EPAA itself or regulations, actions, or

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Energy Action No. 6, 41 Fed. Reg. 40452 (Sept. 20, 1976) (exempting naphtha jet fuel from mandatory petroleum pricing regulations).

[7] Section 755(b) provides:

> (b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

[8] In addition, the District Court held that the Connecticut statute was preempted by the EPAA and its implementing regulations although the express preemption provision of section 755(b) was not applicable. 492 F. Supp. 1014 n. 11, Pet. App. 25a, *citing Jones* v. *Rath Packing*, 430 U.S. 519, 540-41 (1977). Thus, even if Petitioners were correct that the TECA does not have jurisdiction over cases arising under section 755(b), their argument would not apply to this case.

orders thereunder are "directly questioned." Pet. 13. Nowhere in the statute, its legislative history or case law is there any support for this assertion. Indeed, Petitioners once again completely fail to offer any analysis or support for their mutation of the "arising under" standard. The courts have uniformly held that an EPAA issue exists and vests exclusive jurisdiction in the TECA in any case involving "application and interpretation of the EPAA . . . ." *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp., supra; Mountain Fuel Supply Co.* v. *Johnson, supra; M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp., supra.*[9]

Petitioners' final argument for granting their petition on the preemption issue is that "consistency of opinion and maximization of TECA's expertise . . ." are not involved in the question of whether the EPAA preempts section 13(b). Pet. 14. Once again no support exists for this contention. The very case the Petitioners cite, *Chicago and Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232 (1981), states that the federal statute's "construction" must be determined in a preemption case. If preemption requires a federal construction, then an EPAA preemption question absolutely requires the TECA's expertise because resolution depends upon the EPAA, its legislative history and the regulations promulgated thereunder. The TECA is the court most familiar with the EPAA, its regulations, and the amendments thereto and is uniquely qualified to resolve the question. Moreover, as the District Court

[9] Moreover, this interpretation is consistent with the interpretation given to "arising under" in other jurisdictional sections of the judicial code. *See, e.g., Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912); *Ivy Broadcasting Co.* v. *AT&T*, 391 F.2d 486, 492 (2d Cir. 1968); *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

found, state price control statutes of the Connecticut variety create "artificial market conditions" and risk "the very 'supply problems' and 'market distortions' " that are inimical to federal energy policy. 492 F. Supp. at 1014, Pet. App. 26a. Such statutes pose a national problem, and the preemption issue is thus properly presented to a court with a national jurisdiction over EPAA pricing rules.[10]

B. The Temporary Emergency Court of Appeals had exclusive jurisdiction over the abstention issue

The Court of Appeals refused to hear Petitioners' claim that the District Court should have abstained under the doctrine of *Railroad Commission* v. *Pullman,* 312 U.S. 496 (1941), because

> a decision to abstain in this case would necessarily involve a finding that some possible interpretation of Section 13(b) would render the provision consistent with the federal regulatory framework. Such a finding, however, would necessarily entail some analysis of the federal and state statutes and regulations. Thus we will defer to TECA's particular expertise in this area.

639 F.2d at 922, Pet. App. 6a. The Court of Appeals was clearly correct. Abstention is warranted only if some

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[10] Petitioners rely on two state court cases as supporting the proposition that the preemption issue does not "present an EPAA issue". Pet. 11-12, *citing Maryland* v. *Exxon Corp.,* 370 A.2d 1102 (Md. 1977), *aff'd on other grounds,* 437 U.S. 117 (1978), and *ARCO* v. *Tribbit,* 399 A.2d 535 (Del. Ch. 1977). This argument is frivolous. The jurisdictional issue was not decided in, mentioned by, nor (to all appearances) even presented to the state courts in these cases. Under these circumstances, the cases cannot possibly be read as authority for the view Petitioners urge.

reasonably plausible interpretation of the state statute at issue will render it consistent with the requirements of federal law.[11] *Harman* v. *Forssenius,* 380 U.S. 528, 535-36 (1965). Making that determination in this case would have required the Court of Appeals to analyze the requirements of the EPAA, but Congress has limited appellate analysis of the EPAA to the TECA in order to achieve "national uniformity [and] consistency of decision." *Bray* v. *United States, supra,* 423 U.S. at 74-75.

In addition, the analysis required on the abstention issue, involving interpretations both of the EPAA and section 13(b) of Connecticut Public Act 80-71, was the same analysis required on the preemption issue. *See* pp. 3, 8-9 *supra.* Since the TECA had exclusive jurisdiction over the preemption issue, assertion of jurisdiction by the Court of Appeals over an abstention issue requiring analysis of the same two statutes would have been a waste of judicial resources.[12]

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[11] The interpretation of section 13(b) on which Petitioners based their abstention argument in the courts below would limit the reach of that statute to products not within the definition of "petroleum products" in section 4 of the EPAA, 15 U.S.C. §753. This proposed construction would avoid federal preemption claims by rendering section 13(b) inapplicable to the products sold in Connecticut by Respondents, but it would do so by making section 13(b) not applicable to anything.

[12] The Court of Appeals was also correct in basing its refusal to review the abstention claim on its conclusion that abstention was a "threshold issue which has no life apart from the substantive [preemption] claim." 639 F.2d at 921, Pet. App. 6a. *Quincy Oil Inc.* v. *F.E.A.*, 620 F.2d 890, 893 (TECA 1980) (mootness); *Standard Oil Co.* v. *D.O.E.*, 596 F.2d 1029 (TECA 1978) (ripeness); *City of New York* v. *New York Tel. Co.*, 468 F.2d 1401 (TECA 1972) (exhaustion of administrative remedies).

III. The Appeals Court Properly Held That 28 U.S.C. §1341 Did Not Bar The District Court Actions

Petitioners' obvious lack of belief in their 28 U.S.C. §1341 argument is appropriate in light of the extremely thorough severability clause contained in Connecticut Public Act No. 80-71, Conn. Gen. Stat., §12-601 (1981), Pet. App. 45a. As the Court of Appeals noted, "it cannot seriously be argued that the judgment of the court below has enjoined, suspended, or restrained the assessment, levy or collection of the gross receipts tax." 639 F.2d at 922, Pet. App. 7a.

IV. Petitioners' Failure To File A Timely Appeal With The Temporary Emergency Court Of Appeals Does Not Warrant Extraordinary Relief By This Court

Petitioners suggest that even if this Court concludes that the decision of the court below was correct, it should nevertheless vacate the decision of the District Court (and presumably that of the Court of Appeals as well) and remand the case to the District Court for the entry of a new judgment which Petitioners could then appeal to the TECA. They seek to justify this request by characterizing the District Court's opinion as an illogical judicial error. A reading of Judge Blumenfeld's careful and exhaustive opinion, 492 F. Supp. 1004, Pet. App. 8a-28a, refutes this characterization. Petitioners also cite cases which dealt with appeals from three-judge federal courts convened pursuant to 28 U.S.C. §2281 where the appellate path was not clear and argue that similar relief should be afforded "where, as in this case, the law was unclear or uncertain as to where the appeal should be taken." Pet. 19.

The difficulty with Petitioners' argument is that the law was neither unclear nor uncertain as to the manner

of perfecting an appeal from the judgment of the District Court in a risk-free procedure. The simple fact is that the Petitioners failed to follow crystal-clear guidance by the Second Circuit, the Court in which they lodged their appeal. The Second Circuit, a year before the decision of the District Court, explicitly told counsel facing the issue that:

> Uncertainty and the risk of appeal to the wrong court can be avoided by filing two notices of appeal, one in the district court to appeal to the Court of Appeals, Fed.R.App.P.3(a), and one in the TECA to appeal to that Court, Gen.R.T.E.C.A. 15(a).

Coastal States Marketing, Inc. v. *New England Petroleum Corp., supra,* 604 F.2d at 186 n. 9.

Despite this warning and the absence of any unsettled jurisdictional questions with respect to the preemption and abstention issues, the Petitioners ignored the appellate jurisdiction of the TECA. By contrast, Petitioners in the companion case, *Mobil Oil Corp.* v. *Tully,* followed the clear directions of the Second Circuit and filed two notices of appeal. Their argument on the preemption claim was heard by the TECA on April 2, 1981.

There is no sufficient excuse for Petitioners' failure to appeal to the TECA within the time allowed by Congress, ESA §211(b)(2), 12 U.S.C. §1904 note, to justify the extraordinary relief that Petitioners request. *See Harris Truck Lines* v. *Cherry Meat Packers,* 371 U.S. 215, 217 (1962); *United States* v. *Robinson,* 361 U.S. 220 (1960); *United States* v. *Cooper,* 482 F.2d 1393,

1399-1400 (TECA 1973); *Reed* v. *Kroger Co.*, 478 F.2d 1268 (TECA 1973).[13]

The contrast between this case and the three-judge court cases on which Petitioners rely is clear. The earlier decisions of this Court, in which, on direct appeal, the judgment below was vacated for the entry of a new judgment from which a proper appeal could be taken to a court of appeals, were cases in which a three-judge district court had been erroneously convened and in which a decree granting or denying relief on the merits had been entered. *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386 (1934); *United States* v. *Corrick*, 298 U.S. 435 (1936); *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938); *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *MTM Inc.* v. *Baxley*, 420 U.S. 799 (1975); *Butler* v. *Dexter*, 425 U.S. 262 (1976).

Indeed, in several of these cases, the three-judge courts had actually granted relief which this Court held they had no jurisdiction to grant. The consequences of a mere dismissal of a direct appeal under 28 U.S.C. §1253 or its predecessors would have been to let stand an erroneous decree entered by a court having no jurisdiction, a situation expressly recognized by this Court. *United*

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[13] In *Reed* v. *Kroger Co.*, *supra*, 478 F.2d at 1271, the TECA stated:

> In an effort to justify the complete absence of professional care, counsel blandly claims reliance upon the oral advice of a district court clerk. We strongly believe that professional standards require counsel to be familiar with, or to make at least a reasonable effort to learn, the rules of the courts in which they practice.

States v. *Corrick, supra; International Ladies' Garment Workers' Union* v. *Donnelly Garment Co., supra.* In addition, these decisions were grounded upon the Court's power to enforce the limitations upon its own jurisdiction by direct appeal. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra; William Jameson & Co.* v. *Morgenthau, supra; Gully* v. *Interstate Natural Gas Co., supra.*

In light of the foregoing, therefore, no basis has been shown for requesting this Court to vacate the judgment below. If the decision is incorrect, certiorari jurisdiction is available to enable this Court to rectify any error, if deemed appropriate; if the decision is correct, there is no justification for vacating a proper judgment in order to enable Petitioners to remedy their own delinquency in failing to file a timely notice of appeal to the court having proper appellate jurisdiction.

CONCLUSION

For the reasons stated herein Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners,*

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MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents.*

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners,*

v.

TEXACO INC., *Respondent.*

ELLA T. GRASSO, Governor of the State of Connecticut, et al., *Petitioners,*

v.

AMERADA HESS CORPORATION, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1813

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut, et al., *Petitioners,*

v.

MOBIL OIL CORPORATION, AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION AND SHELL OIL COMPANY, *Respondents.*

CARL R. AJELLO, Attorney General of the State of Connecticut, et al., *Petitioners,*

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v.

AMERADA HESS CORPORATION, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6 of the Rules of this Court, Respondents respectfully submit, in the Appendix hereto, a copy of the opinion of the Temporary Emergency Court of Appeals in *Mobil Oil Corp.* v. *Tully*, dated June 10, 1981, involving the validity of the price regulation provision in the related New York cases referred to in the brief in opposition previously filed. In the light of that decision, Petitioners' suggestion that the judgment below should be vacated in order to enable them to appeal to the Temporary Emergency Court of Appeals would seem to have been mooted.

Respectfully submitted,

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June, 1981

APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 2-29

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC., and EXXON CORPORATION, *Plaintiffs-Appellees,*

-against-

JAMES H. TULLY, JR. THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York States Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA Commissioner of the New York State Energy Office, *Defendant-Appellants,*

No. 2-30

AMERADA HESS CORPORATION, *Plaintiff-Appellee,*

-against-

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office, *Defendants-Appellants*

No. 2-31

NEW ENGLAND PETROLEUM CORPORATION, *Plaintiff-Appellee,*

-against-

JAMES H. TULLY, JR. Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,
Defendants-Appellants,

Appeal from the United States District Court
for the Northern District of New York
(Nos. 80 Civ. 543, 80 Civ. 570, 80 Civ. 544)

Argued: April 2, 1981 Decided: June 10, 1981
Judgment Entered: June 15, 1981

APPEARANCES

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Before METZNER, PECK and LACEY, Judges

METZNER, Judge

This is an appeal from a judgment entered on an order granting plaintiffs' motion for summary judgment.

In June of 1980, New York State established a 2 per cent tax on the gross receipts of oil companies limited to their revenues derived from activities within the state. 1980 N.Y. Laws ch. 271, 272; N.Y. Tax Law §182 (McKinney Supp. 1980). The statute further provided that the oil companies could not pass the cost of the tax on to consumers by increasing the sales price of their products in this state. Ten oil companies subject to the tax instituted suit to enjoin the anti-passthrough provision based on the Supremacy Clause of the United States Constitution (Art. VI, cl. 2).

Plaintiffs claim that the state statute is in conflict with the Emergency Petroleum Allocation Act (EPAA) (Pub. L. 93-159, 15 U.S.C. §751, et seq.) and the regulations adopted thereunder. The district court agreed with that position and appeals followed to this court and the Court of Appeals for the Second Circuit.

The prosecution of the appeal in this court was stayed pending determination by the Court of Appeals.

On January 28, 1981 the Court of Appeals held that the district court in disposing of the question of preemption, had disposed of an EPAA issue over which this court had exclusive appellate jurisdiction. *Mobil Oil Corp.* v. *Tully*, 639 F.2d (2d Cir. 1981).[1]

The question before this court is limited to whether the anti-passthrough provision of the New York Tax Law is invalid under the Supremacy Clause. The plaintiffs do not challenge the imposition of the tax. However, an affirmance

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[1] The Court of Appeals held that it had jurisdiction to decide that the district court was not deprived of jurisdiction by the Tax Injunction Act (28 U.S.C. §1341) because the statute under attack is an exercise of the police power rather than the taxing power of the State.

of the district court's finding of unconstitutionality will void the tax. Section 12, L. 1980 c. 271, as added by L. 1980, c. 272, §5.

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Court set forth the criteria to be applied in determining whether the exercise by a state of its police power in the adoption of a statute may be challenged successfully under the Supremacy Clause.

> "Congress legislated here in a field which the States have traditionally occupied. See *Munn* v. *Illinois*, 94 U.S. 144, 148-149. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local* v. *Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co.* v. *Railroad Commission*, 236 U.S. 439; *Charleston & W.C.R. Co.* v. *Varnville Co.*, 237 U.S. 597; *New York Central R. Co.* v. *Winfield*, 244 U.S. 147; *Napier* v. *Atlantic Coast Line Ro. Co., supra.*"

Preemption in this area is compelled "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Even if Congress has not foreclosed the field, a state statute is void to the extent of actual conflict with a federal statute. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158, 165 (1978); *Hill* v. *Florida*, 325 U.S. 538 (1945). This standard was recently outlined by the Supreme Court in *Chicago and North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232, 4233 (March 9, 1981):

> ". . . when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971) quoting *Hines* v. *Davidowitz* . . . supra, at 67-68."

Judge McCurn found it unnecessary to decide whether Congress had intended that there be exclusive federal control over allocation and pricing of petroleum products, resting his decision on the "conflict" standard for preemption. We, too, do not reach the "occupation of the field" question; we find sufficient basis under the conflict power in enacting the anti-passthough provision.

The procedure in analyzing possible preemption under the conflict standard is to compare the two statutes; and second, to determine whether there is a conflict between them. This second inquiry focuses on the nature of the activity which the state has attempted to regulate, rather than the method of regulation used. *Chicago and North Western Transportation Co.* v. *Kalo Brick & Tile Co. supra*, 49 U.S.L.W. at 4233.

With the advent of the Arab oil embargo in 1973, this country was faced with a national crisis in the flow of energy supplies and inflation. Congress addressed the problem in the passage of the EPAA. The statute stated that shortages of crude oil, residual fuel oil and refined petroleum products existed which would create sever economic hardships that would jeopardize the normal flow of commerce and

"constitute a national energy crisis which is a threat to the public health, safety, and welfare, and can be averted or minimized effectively through prompt action by the Executive branch of Government." Section 751(a)(3). The statute went on the say that "the authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy." Section 751(b). Section 753(b)(1)(F) states, as one of the objectives of the statute, the "equitable distribution of crude oil, residual fuel oil, and refuned petroleum products at equitable prices. . . ."

Senator Jackson, as floor manager of the bill, said, "Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level." 119 Cong. Rec. 17764 (1973). Finally, the conferees who submitted the bill for final passage by the Congress said:

> "On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government." U.S. Code Cong. & Admin. News, pp. 2702-3 [1973]

In adopting the 1975 amendments to EPAA, known as the Energy Policy and Conservation Act (EPCA), Congress reiterated its goal that "the Arab boycott raised public consciouness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level." [1975] U.S. Code Cong. & Admin. News, p. 1763.

The EPAA and the regulations form a framework for federal control of price and allocation of petroleum prices. However, the tenor of federal regulation of petroleum products has substantially changed since this action was brought and the decision of the district court was handed down.

In 1975 Congress gave the President authority to exempt, in his discretion, "crude oil, residual fuel oil, or any refined petroleum product or refined product category" from price an allocation regulations under the EPAA, consistent with the nine statutory objectives noted above. 15 U.S.C. §760a, Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975). The President has standby authority to reimpose regulation of any oil or refined product category which is exempted. 15 U.S.C. §760a(f).

At the time this matter was submitted to the court below for determination, only gasoline, propane, and certain natural gas liquids remained subject to the price regulations. All other petroleum products had been exempted. On January 28, 1981, while this case was awaiting appellate disposition, President Reagan exercised his authority to exempt the remaining products. 46 Fed. Reg. 9909. Consequently, at the present time there are no price and allocation controls in existence.

However, despite the exemption of all petroleum products from price and allocation regulations by executive order, the federal slate has not been wiped clean. The standby authority of the President to reimpose controls (15 U.S.C. §760a(f)) remains in effect, at least until that authority expires on September 30, 1981. 15 U.S.C. §760g.

The regulations which were promulgated under the EPAA are a complex set of rules to allocate petroleum products; control prices charged; and dictate the method of computation of any increases in price. Subpart E, 10 C.F.R. §§212.81-85. Prices are controlled by limiting refiners to a "maximum allowable price," computed as the weighted average price at which the coverd product was sold on May 15, 1973, plus defined increased product and nonproduct costs since that date. 10 C.F.R. §§212.82(6) and 212.83.

In 1977 "federal, state and local tax increases," excluding income taxes, were included in the nonproduct costs which the refiners were permitted to use to compute their maximum

allowable price. 10 C.F.R. §212.83(c)(2)(iii)(E)(7), 42 Fed. Reg. 5025 (January 27, 1977). Property, excise, franchise and similar taxes are explicitly included.

Turning now to the New York State statute, its purpose was to raise money to assist the public transportation system in the state which is in dire financial straits. To achieve this end, the state enacted a franchise tax, New York Tax Law §182 (McKinney Supp. 1980), and, as pointed out above, this tax was within the group of taxes which an oil company under the federal regulations could have passed through to the consumer. The consuming public was to be protected against an increase in retail cost by the anti-passthrough provision and the fires of inflation would not be fed as a result.

The anti-passthrough provision is clearly a price control measure in exercise of the State's police power. The stated purpose of the provision is to prevent "further increases in the price of petroleum products to consumers," and to prevent the tax from "fueling inflation by prohibiting pass through of such tax to the consumers of this state." N.Y. Act, Ch. 272, §1. As the Court of Appeals noted in another context, "[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." *Mobil Oil Corp.* v. *Tully, supra* at 918. We agree with this observation.

The federal controls were imposed to assure equitable distribution of oil products and equitable prices. The latter requires a fair balance between seller and buyer, and between geographical areas. The conferees stated that the seller were to be assured adequate compensation to prevent the confiscation by the government of private property.

The state tax upsets this balance. The sellers will receive a greatly diminished net income from sales in this state, as compared to neighboring states.

Furthermore, the sellers, in order to recoup this loss, will try to pass on the cost of the franchise tax to purchasers in other states. To the extent that they are able to pass on the tax, the goal of equitable pricing is not met.

Appellants claim that the EPAA by its terms precludes a finding of preemption in this case.

Section 755(b) provides:

> "The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

The argument is made that since this section specifies preemption only if a state law providing for allocation of a product is in conflict with a regulation issued pursuant to Section 753, there can be no preemption if the conflict exists outside that narrowly defined area. Appellants rely on a letter from the Acting General Counsel of the Department of Energy (DOE) to the Special Counsel to the New York State Tax Commission. The letter states that in the opinion of the writer, "the Emergency Petroleum Allocation Act itself displaces State law only to the extent that that statute or its implementing regulations conflict with state law. . . ." It is interesting to note that the letter defines the area of preemption in slightly broader terms than appellants do—federal statute as well as regulations in conflict with state law.

The Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), set forth the criteria for judging the effectiveness of this letter. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The writer of the letter took care to limit its effectiveness by stating as a caveat, "First, the time within which I was advised to require a response to this question did not permit an exhaustive analysis of the question you posed." Furthermore,

as Judge McCurn said, "the conclusion in the letter was, in light of *Jones*, reached either without reference to, or through the incorrect application of, judicially determined premption principles."

Finally, under DOE's own regulations, the letter is of little value. It appears that the request to DOE for an interpetration did not comply with its requirements for such an interpretation. Replies to such requests cannot be considered as interpretations but only as "providing general information." 10 C.F.R. 205.80.

Jones v. *Rath Packing Co.*, 430 U.S. 519, 540-41 (1977) determined that even though an express preemption provision did not invalidate a state law, the question still had to be determined "whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " It borders on the ridiculous to conclude, in the context of the crisis being addressed here, that there may be preemption in the area of allocations, but there is no preemption in the area of pricing.

Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPAA expires by its terms on September 30, 1981. 15 U.S.C. §760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price control and in conflict with the objectives of the program. See *Ray* v. *Atlantic Richfield*, 435 U.S. 151, 178 (1978).

When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations.

Judgment affirmed.